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FUTURES TRADING PRACTICES ACT OF 1991

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Mr. LEAHY, from the Committee on Agriculture, Nutrition, and Forestry, submitted the following

REPORT

[To accompany S. 207]

The Committee on Agriculture, Nutrition, and Forestry to which was referred the bill (S. 207) having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

	Page
Purpose of the legislation	1
Background and need	2
Summary of major provisions	10
Committee consideration	17
Rollcall votes	26
Section-by-section analysis	26
CBO cost estimate	64
Regulatory impact evaluation	65
Agency views	67
Changes in existing law	77

PURPOSE OF THE LEGISLATION

The purpose of S. 207 is threefold: First, section 12(d) of the Commodity Exchange Act (7 U.S.C. 1 et. seq.) (the "Act") authorizes appropriations to the Commodity Futures Trading Commission (the "CFTC" or "Commission") for fiscal years ending September 30, 1989. Further authorizations beyond that date are needed in order to continue orderly funding of the Commission as a permament agency and to establish appropriate levels of such funding. Second, the Committee has concluded, based on its inquiry into regulation of trading practices in the commodity futures markets (discussed below), that improvements in such regulation are needed to main-

S163-3

tain the integrity of those practices and public confidence therein. Third, legislation is required to establish a system of Federal oversight of margins on stock-index futures contracts (and options thereon), to clarify the regulatory treatment of hybrid commodity products, and to provide the Commission with additional statutory exemptive authority.

Background and Need

The American public—producers, consumers, farmers, investors, and market professionals—all suffered a major setback last year from the failure to pass meaningful futures trading practices legislation in the 101st Congress. The case for tighter regulation had been made most dramatically by the fraud indictments of 48 traders in 1989 growing out of a Federal Bureau of Investigations "sting" operation aimed at the Nation's two largest futures exchanges located in Chicago. So far, 32 of those traders have been convicted or pled guilty, including 10 soybean traders convicted of criminal fraud in the handling of customer orders in January 1991; 8 were also convicted on racketeering charges.

The Chicago case did not stand alone. A May 1989 CFTC-led "sting" on the New York City futures markets has led so far to formal disciplinary charges by the CFTC against eight traders and two firms. That same summer, an emergency in the Chicago soybean market raised a storm of concern among farm producers.

Congress in late 1989 had taken substantial steps toward adopting significant reforms to address these trading practice concerns. In November 1989, the Committee on Agriculture, Nutrition, and Forestry (the "Committee") voted to report the "Futures Trading Practices Act of 1989" (S. 1729). Similar legislation, the "Commodity Futures Improvements Act" (H.R. 2869), had been approved by the House of Representatives in September. These initiatives were supported by a broad consensus in Congress, the public, and much of the futures industry itself.

Final action on this legislation in early 1990 was blocked by a conflict over whether to shift jurisdiction for stock-index futures contracts from the CFTC to the Securities and Exchange Commission—a debate stemming most recently from the violent stock market price breaks of October 1987 and October 1989. This clash was heightened by argument over the regulatory treatment of certain financial instruments: index participations, swaps, hybrid commodity products, and others.

The Secretary of the Treasury requested in May 1990 that the jurisdictional issue be resolved by Congress at the same time as futures trading practice legislation and, in June, the Treasury Department submitted legislation to shift stock-index futures jurisdiction to the SEC while eliminating the CFTC's "exclusive" authority over a wide range of futures instruments.

Beyond blocking the enactment of needed trading practice reforms, the continuing debate over jurisdiction has threatened to create a dangerous element of instability in our financial regulatory structure and has drained away large reservoirs of time, energy, and attention from pressing regulatory needs.

It has also prevented action to address a number of points raised in the debate, particularly with respect to the introduction of new financial products and the need for Federal oversight of stock-index futures margins. At the same time, confidence in all equity-related markets—stocks, options, and related futures—suffers from a perception that the principal Federal regulators disagree so deeply over jurisdictional policy that they might fail to work together effectively in the event of a true emergency.

In addition to toughing regulation of futures trading practices, a principal purpose of S. 207 is to settle this jurisdictional conflict so that (1) needed reforms affecting trading practices and intermarket coordination can be enacted promptly, (2) the affected Federal regulators can turn their full attention to their substantive responsibilities, and (3) regulatory certainty for new financial products can be achieved to make U.S. markets more competitive.

TRADING PRACTICE REFORMS

The Background and Need of the specific provisions of titles I and II of the bill, designed to strengthen the Commission and to toughen the regulation of futures trading practices, are discussed in Senate Report 101-191 to accompany S. 1729, the Futures Trading Act of 1989. These titles are substantially identical to the provisions of Division A of S. 207.

INTERMARKET COORDINATION:

Margins

Following the historic 508-point stock market break of October 19, 1987, several studies by government panels and private organizations pointed to the need for greater coordination or communication among regulators for equity securities and related markets such as equity options, equity index options, and stock-index futures (and options thereon). Since the introduction of stock-index futures trading in 1982, these markets had become highly interdependent—described in one study as "one market—linked by financial instruments, trading strategies, market participants and clearing and credit mechanisms * * * [and] fundamentally driven by the same economic forces." See "Report of the Presidential Task Force on Market Mechanisms," January 1988.

In some circumstances, price movements or financial disruptions in one of these markets can be transmitted quickly to the others. As Chairman Alan Greenspan of the Board of Governors of the Federal Reserve System, explained in testimony to the Committee on February 7, 1991: "Without appropriate safeguards, losses can lead to the failure of key market participants, jeopardize contract performance, and threaten the integrity not only of the market in question but other markets as well. * * * Containment of risk through use of these tools [margin, capital requirements, so on] is essential to maintain public confidence in the soundness of our financial markets and to avoid excessive strains on our clearing and payment systems."

Central to virtually all discussion of the need for greater regulatory coordination was margin.

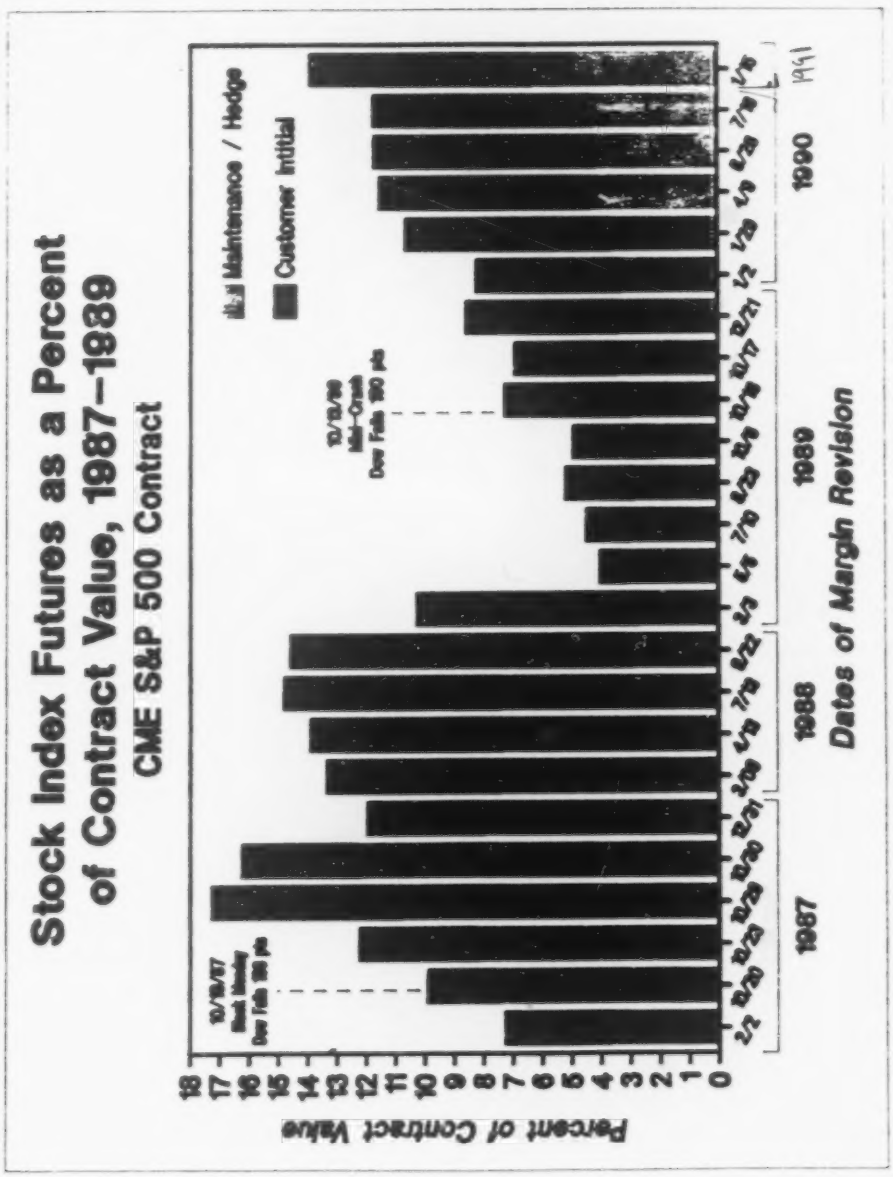
Margin plays different roles in different markets. In futures markets and for option sellers, margin represents a good faith deposit on performance of future contractual obligations. Futures margins are a key protection for the financial integrity of market institutions, providing a ready cash cushion against default. Margins are marked-to-the-market on a daily or intra-day basis.

For stock purchasers, margin serves a credit function and represents a downpayment on a loan.

Differences also exist in how margins are set in different markets. Securities margins fall under the authority of the Board of Governors of the Federal Reserve System. The Board has used this authority to set margin levels directly for stock purchases. For index options, it has effectively delegated day-to-day margin-setting to the securities exchanges subject to oversight by the Securities and Exchange Commission.

In the case of futures, margin levels are set by the relevant contract market. The CFTC may set exchange margin levels directly only in an emergency. Futures exchanges raise or lower margin levels frequently to reflect fast-changing market conditions (see table A).

TABLE A


Stock Index Futures as a Percent of Contract Value, 1987–1989
CME S&P 500 Contract
Initial Maintenance / Hedge
Customer Initial
10/19/87 Black Monday Dow Falls 508 pts
10/13/89 Mini-Crash Dow Falls 190 pts
Percent of Contract Value
0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
2/2 10/20 10/29 10/30 11/21 1/8 1/22 2/3 4/4 7/7 7/28 8/8 8/17 8/21 1/2 1/29 1/9 1/26 1/16
1987
1988
1989
1990
1991
Dates of Margin Revision

The importance of margin in protecting the financial integrity of futures market institutions—coupled with the concern that a financial disruption in stock-index futures may spread to related markets in equities and options or vice versa—has prompted calls for coordinated Federal oversight on more than an emergency basis.

The bill responds by providing margin oversight authority for stock-index futures contracts and options thereon to the Board of Governors of the Federal Reserve System.

Financial Products

Financial products containing elements of futures contracts that have evolved in recent years ranging from index participations to swaps to oil-indexed bonds have become a major source of legal uncertainty among regulators and the financial community. Many of these instruments are important innovations useful to commerce and vital to maintaining the competitiveness of U.S. markets in the global environment. To address this situation, the Commission has developed a series of releases, interpretations, no-action letters, and occasional court briefs to distinguish between products falling inside or outside its jurisdiction, often on a case-by-case basis. Since 1986, the CFTC has issued 14 no-action and interpretative letters discussing whether an instrument was a futures contract under its jurisdiction. During this time, at least five significant Federal court decisions have been handed down on this issue (see table B).

Since 1974, when Congress created the CFTC, the principle of "functional" regulation was intended to govern the introduction of new financial instruments: "the CFTC would * * * regulate markets and instruments that serve a hedging and price discovery function and the SEC would regulate markets and instruments with an underlying investment purpose." S. Rept. No. 384, 97th Cong., 2d sess. 22 (1982).

But increasingly, this principle has become blurred as novel "hybrid" instruments are developed. Bonds—a traditional security—can be transformed to offer a return indexed to the price of a commodity like oil or gold. The final product may have significant attributes of a commodity option or future.

This lack of clarity over the extent of CFTC jurisdiction with respect to new "hybrids" and the statutory requirement that all futures contracts must trade on designated contract markets have combined to create a legal cloud that may inhibit the emergence or development of many such markets. Under current law, the CFTC has the power to permit a commodity option to trade off exchange in accordance with CFTC rules, but the CFTC has no authority to exempt any futures product from the exchange-trading requirement. This disparate treatment could prevent the CFTC from permitting the introduction of many economically useful new products to the marketplace.

TABLE B.—CFTC NO-ACTION AND INTERPRETATIVE LETTERS ADVISING PARTIES AS TO WHETHER AN INSTRUMENT IS A FUTURES CONTRACT UNDER THE COMMODITY EXCHANGE ACT

1. CFTC Statutory Interpretation Concerning Certain Hybrid Instruments, 54 F.R. 1139 (Jan. 11, 1989), which recognizes an exclu-

sion under the CEA and regulations thereunder for hybrid instruments that combine characteristics of futures contracts or commodity options with debt or depository instruments and that meet certain specified criteria.

2. CFTC Policy Statement Concerning Swap Transactions, 54 F.R. 30694 (July 21, 1989), which concludes that swap transactions which meet specified requirements will not be regulated as futures or commodity option transactions under the CEA or the regulations thereunder.

3. CFTC Statutory Interpretation Concerning Forward Transactions, 55 F.R. 39188 (Sept. 25, 1990), which concludes that certain commercial transactions, like 15-day Brent contracts, are excluded from regulation under the CEA as sales of cash commodities for deferred shipment or delivery.

4. OGC Interpretative Letter No. 86-5 dated June 17, 1986, taking no-action position under Section 4(a) of the CEA regarding export trading company's proposed financial credit arrangements with U.S. exporters and others engaged in international trade.

5. OGC Interpretative Letter No. 86-7 dated November 26, 1986, concluding that proposed live hog delivery contract is not a futures (or an option) contract.

7. Interpretative Letter No. 86-10 dated June 20, 1988, from the Off-Exchange Task Force taking no-action position under section 4(a) of the CEA regarding the issuance by a stockholder-owned corporation of notes the principal value of which is related to the dollar/yen exchange rate.

8. Interpretative Letter No. 88-11 dated July 13, 1988, from the Off-Exchange Task Force taking no-action position under section 4(a) of the CEA regarding the issuance by a stockholder-owned corporation of long-term notes the principal value of which is related to the dollar/yen exchange rate.

9. Interpretative Letter No. 88-12 dated July 22, 1988, from the Off-Exchange Task Force taking no-action position under section 4(a) of the CEA regarding the issuance by three separate companies of notes which have a principal value related to the exchange rate between the dollar and a foreign currency.

10. Interpretative Letter No. 88-18 dated November 21, 1988, from the Off-Exchange Task Force taking no-action position under section 4(a) of the CEA regarding the proposed issuance and offering of notes which constitute commercial paper, the principal amount of which would at maturity be adjusted based on the fluctuation in the exchange rate between the dollar and a specified foreign currency.

11. Interpretative Letter No. 88-19 dated November 23, 1988, from the Off-Exchange Task Force concluding that proposed sales of hay for future delivery were forward contracts rather than futures contracts.

12. Letter dated October 11, 1989, from the Off-Exchange Task Force refusing to take a no-action position under section 4(a) of the CEA regarding the proposed issuance of certain commercial paper notes the principal amount of which is indexed to the differences between exchange rates for various currencies.

13. Interpretative Letter No. 90-4 dated April 25, 1990, from the Off-Exchange Task Force taking no-action position under section

4(a) (as well as section 4c) of the CEA regarding the execution and performance of certain crude oil contracts by a trust the units of which will be publicly offered and secondarily marketed.

14. Letter dated August 6, 1990, from the Off-Exchange Task Force taking no-action position under section 4(a) (as well as section 4c) of the CEA regarding a proposed minimum price grain contract.

FEDERAL COURT CASES ADDRESSING WHETHER AN INSTRUMENT IS A FUTURES CONTRACT

Chicago Mercantile Exchange, et al. v. *SEC*, 883 F.2d 537 (7th Cir. 1989), *rehearing denied* (October 23, 1989), *cert. denied*, 110 S.Ct. 3214 (1990).

On August 18, 1989, the United States Court of Appeals set aside an order of the Securities and Exchange Commission which had approved the trading of instruments known as index participations ("IPs") on three stock exchanges. An IP is a contract to purchase or sell the value of an index measuring the prices of various stock. The court concluded that IPs did not come within the jurisdiction of the SEC but rather were futures contracts subject to the exclusive jurisdiction of the CFTC. 883 F.2d 537 (7th Cir. 1989).

Transnor (Bermuda), Ltd. v. *BP North America Petroleum, et al.*, No. 86 Civ. 1493 (WCC) (S.D.N.Y.).

In denying a motion for summary judgment, the district court concluded, among other things, that certain Brent Market transactions were futures contracts within the meaning of the Commodity Exchange Act. The so-called Brent 15-day contract was a contract for the purchase or sale of a cargo of Brent oil for delivery during a specified forward month on 15 days notice to the buyer. The facts found by the district court indicate that the specific transactions at issue apparently created no specific delivery obligations between the parties because the contracts were executed as part of an arrangement between the parties that they would be offset.

Messer v. *E. F. Hutton & Co.*, 847 F.2d 673 (11th Cir. 1988).

After examining the text and legislative history of the Commodity Exchange Act, the court, sitting en banc, concluded that T-Bond futures contracts traded on a futures exchange are not subject to regulation as securities because the Commodity Exchange Act provides the exclusive regualtory scheme governing the trading of these instruments. By implication, the court also held that discretionary commodity accounts are not securities.

Point Landing, Inc. v. *Omni Capital International, Ltd.*, 795 F.2d 425 (5th Cir. 1986), *aff'd on other grounds sub nom. Omni Capital International, Ltd.* v. *Rudolph Wolff & Co., Ltd.*, 108 S.Ct. 404 (1987).

In a unanimous en banc opinion, the court held that the Commodity Exchange Act preempts private actions under section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5. Specifically, the court found that the CFTC has been conferred with exclusive jurisdiction over investments in silver straddle commodity futures traded on a foreign exchange through discretionary commodity trading accounts.

Krommenhoek v. *A-Mark Precious Metals, Inc.*, No. 90-35604 (9th Cir.).

This is a pending appeal from a district court decision holding that "deferred delivery/margin" sales of precious metals by a wholesale dealer to a retail metals dealer were not futures contracts solely because there was no public involvement. On December 17, 1990, the Commission filed an amicus curiae brief arguing that the court erred as a matter of law in concluding that public involvement is a necessary element of a futures contract, and that there is no support in the Commodity Exchange Act or its legislative history for the court's view that Congress did not intend to regulate futures contracts between commercial counterparties.

The bill responds by authorizing the CFTC to exempt certain products from Commodity Exchange Act regulation and by creating a new "functional" test for resolving jurisdiction questions involving hybrid instruments.

Swaps.—Participation in "swaps," which generally are individually negotiated risk-management contracts primarily among financial institutions, governments, and corporations, has grown tremendously in several years. The International Association of Swap Dealers estimates that $3+ billion in swap transactions are currently outstanding, mostly involving exposure in interest rates and currencies.

Swaps generally are said to differ from futures contracts because they are individually tailored rather than fully fungible exchange-traded instruments. Still, legal uncertainty has developed as to the applicability of the Commodity Exchange Act to certain swap transactions which have become more standardized. The CFTC addressed this concern through issuance of a July 1989 policy statement under which swaps satisfying seven specific creteria would not be regulated by the Commission ("CFTC Policy Statement Concerning Swap Transactions," 54 FR 30694 (July 21, 1989)).

Nevertheless, the concern was reignited by the 1990 court decision in *Transnor (Bermuda), Ltd.* v. *BP North America Petroleum, et al.*, No. 86 Civ. 1493 (WCC) (S.D.N.Y.), which concluded that 15-day Brent oil transactions were futures contracts under the Commodity Exchange Act. The *Transnor* ruling had a disruptive effect on the Brent market and raised fears of a similar ruling affecting swaps. The CFTC, since that time, has addressed the Brent situation by issuing a statutory interpretation concluding that Brent contracts are not futures but rather forward contracts falling outside the Commodity Exchange Act ("CFTC Statutory Interpretation Concerning Forward Transactions," 55 F.R. 39188 (September 25, 1990)).

The bill responds by excluding certain swaps from the Commodity Exchange Act and directing the CFTC to exempt certain addition swaps from the Act.

Index participations.—Index participations (IPs) are products developed by securities exchanges allowing retail customers to invest in a basket of stocks in a form designed to have, for the purchaser, similar characteristics as a purchase of traditional stock shares or mutual fund units. The IP buyer pays the full price up-front subject to securities margin rules and receives periodic dividend-equiv-

alent payments. The IP has no fixed expiration date but rather an optional "cash-out" feature.

The SEC on April 11, 1989, approved three exchange-proposed IPs to trade on securities markets (SEC Release 34-26709, 54 F.R. 15280 (1989)). While IP trading started on the three markets shortly thereafter, litigation was initiated by futures exchanges challenging the SEC order on the ground that an IP was a futures contract under the exclusive jurisdiction of the CFTC.

Some 630,170 IP contracts traded on the American Stock Exchange alone over the next several months despite the impending legal controversy.

In August 1989, the 7th Circuit Court of Appeals ruled in *Chicago Mercantile Exchange* v. *Securities and Exchange Commission*, 883 F. 2d 537 (7th Cir., 1989), cert. denied —— U.S. ——, that IPs were in fact futures contracts and that, therefore, because of the "exclusive" nature of CFTC jurisdiction, they could not trade on a securities exchange even if they were securities.

The bill responds by permitting index participations approved by or proposed to the SEC before December 31, 1990, to trade on securities markets.

Summary of Major Provisions

The major provisions of S. 207 as amended by the Committee are briefly described below:

TITLE I—COMMODITY FUTURES TRADING COMMISSION; FUNDING AND PERSONNEL

Strengthening the Commission

The bill provides authorization of appropriations for the Commission for 5 years. In doing so, the bill authorizes a 50 percent budget increase for the Commission over 5 years (adjusted for inflation). Authorized funding would rise from $48.3 million in fiscal year 1992 to $71.9 million in fiscal year 1996.

The bill also authorizes the Commission to establish a pay system comparable with Federal banking regulators. This would help the Commission to retain skilled personnel, particularly in regional offices now suffering high turnover. The Commission could not implement this authority until after a period for congressional review.

Service fees

To help finance this increase in authorized appropriations, the bill expands the Commission's authority to charge service fees reflecting its cost in monitoring trading floors and ensuring compliance by contract markets and other registrants with regulatory standards. The Commission could consider phasing in fee increases to accommodate other upfront costs required by this bill, particularly with regard to new audit trail systems. These fees can total no more than the increase in Commission spending authorized under this Act as adjusted by the Congressional Budget Office baseline: $3.9 million in fiscal year 1992, $7.8 million in fiscal year 1993, $13.8 million in fiscal year 1994, $20.8 million in fiscal year 1995, and $21.7 million in fiscal year 1996.

TITLE II—FUTURES TRADING PRACTICES

A. Next generation audit trail technology

The bill requires futures exchanges to implement within 3 years new audit trail systems capable of capturing transaction times and data independently and precisely as proposed by the GAO.

The bill requires the Commission, with GAO comments, to report to Congress within 2 years on the progress of exchanges in installing the new systems, including their advice on whether the statutory timetable or standards need adjustment.

The bill mandates that, for customer orders, the audit trail system must precisely and securely record the time the order is received on the exchange floor, is received by the floor broker for execution, and is reported from the floor as executed. For these order-routing data, the exchange must comply to the extent practicable as determined by the Commission. The Commission is authorized to grant limited exemptions to these audit trail requirements for small exchanges which otherwise demonstrate substantial compliance with the objectives of this provision, and for categories of orders sent to and reported from the trading pit in an extremely rapid manner.

B. Exchange accountability

The bill expands the Commission's power to direct a contract market to improve its trade practice oversight and disciplinary systems.

The bill requires the Commission to assess each contract market's system—including the audit trail and other floor oversight and compliance efforts—on a 2-year cycle. If the Commission finds flaws at any time, it can issue a proposed "deficiency order"—which becomes final under procedures similar to those applicable to informal agency rulemaking—requiring that corrections be made under a Commission-set timetable. If the contract market violates this order, it becomes subject to Commission enforcement action aimed at suspension or revocation of its designation as a contract market and to penalties of fines up to $500,000 per violation and a cease and desist order; if it violates the cease and desist order, fines can escalate up to $500,000 per day.

Under this system, the Commission could require a contract market——

1. To institute improvements in its trade monitoring, compliance, or disciplinary systems needed to correct identified deficiencies;

2. Satisfy objective performance criteria;

3. Upgrade technology or commit added resources to floor surveillance;

4. Suspend dual trading where appropriate; or

5. Remove particular officers, directors, staff or committee members after a hearing on the record if they have willfully violated relevant statutes, rules, or regulations, abused their authority, or, without reasonable justification, failed to enforce compliance with the contract market rules.

The bill permits the Commission to delay approval of new contracts for a contract market while a deficiency order is in effect or pending before the Commission.

Dual trading

The bill requires the Commission, during the first 18 months after enactment, to initiate "deficiency order" proceedings to suspend dual trading at any contract market unless it finds that the contract market's trade oversight system, including the audit trail, can and does detect and discipline dual trading-related abuses. If deficiencies do exist but there is substantial likelihood that a dual trading suspension would harm the public interest, then the Commission could impose other deficiency order remedies. The Commission can fashion the dual trading suspension to the particular circumstances of the particular affected market or exchange.

The bill in no way limits or affects the Commission's existing authority to ban or regulate dual trading under section 4j of the Commodity Exchange Act.

C. Exchange "Sunshine"

The bill requires each contract market and registered futures associations to open its governing procedures to a broad cross-section of market and public interests and take specified steps to prevent conflicts of interest and insider deals.

Board of directors

The bill requires exchange boards to include meaningful representation of such interests as brokerage firms, producers and consumers of commodities traded on the exchange, floor traders and brokers. At least 20 percent of the board must be qualified non-member public directors.

The bill further requires that no less than 10 percent of the members of a governing board be comprised of farmers, producers, merchants, or exporters.

Disciplinary panels

The bill requires that major disciplinary panels be diverse enough to ensure fairness and prevent special treatment or preference in disciplinary proceedings and assessment of penalties. Where appropriate for fairness—such as where an exchange director or disciplinary committee member is the subject of a proceeding or where price manipulation is alleged—non-members of the exchange must be included.

Conflict of interest

The bill requires that, to prevent conflicts of interest: (1) Exchange directors must abstain from any matter where they, or a close associate, are a named party in interest; (2) before any emergency deliberation, the board or committee—acting directly or through a designated member or staff counsel—must review the market positions of each member for possible conflict of interests, including positions held in accounts at affiliated firms. The board would then take full responsibility for deciding whether the "interested directors" may participate. Exchanges also must prevent in-

siders from exploiting official access to nonpublic information for personal gain.

Members with disciplinary records

The bill requires that members having violated Federal commodity laws or other rules reflecting on their fitness be barred from serving on exchange oversight or disciplinary panels for an appropriate time as defined by the Commission.

D. Civil liability/punitive damages

The bill allows customers harmed by floor brokers committing willful and intentional violations to sue for recovery of actual damages plus punitive damages of up to double the actual losses (triple damages altogether) in private lawsuits or reparations claims. Arbitration systems established by the National Futures Association (NFA) and the exchanges must also provide for punitive damages under similar conditions.

Accountability of brokerage firms

The bill clarifies that in a lawsuit brought by an aggrieved customer, a retail brokerage firm (futures commission merchant) can be responsible to the customer for losses caused by the malfeasance of an independent floor broker it selects to execute that customer's order on the exchange floor. The bill provides that, if the brokerage firm willfully and intentionally selected the floor broker with the intent to assist in or facilitate the violation, it could be required to pay punitive damages as well.

Customer notification

The bill requires a futures contract market, when it takes final disciplinary action against a member-floor broker or trader for floor trading violations resulting in financial harm to a customer, to notify the victimized customer's brokerage firm. Such firm is then required to notify the customer.

Class action suits

The bill authorizes the Commission to adopt rules providing for class action suits under the reparations system if it decides that it can manage the resource burden involved in such complex cases and that it can provide a useful forum for these actions compared with Federal court.

E. Penalties

The bill stiffens penalties for violations of the Act by:

1. Authorizing the Commission to assess fines against rule violators of the higher of $100,000 (the current ceiling) or triple the monetary gain per violation;

2. Extending criminal penalties to those who willfully provide false information to self-regulators (such as by making fraudulent audit trail entries) or who willfully and knowingly violate Commission rules;

3. Raising top civil penalties against contract markets from $100,000 to $500,000 per violation;

4. Including restitution to customers as a penalty which the Commission can impose against defendants in Commission enforcement actions;

5. Authorizing the Commission to suspend or modify the registration of persons indicted of certain felony crimes under expedited procedures; and

6. Authorizing the Commission to assess penalties based solely on the gravity of the offense, and providing for automatic registration suspensions against those who fail to pay fines in a timely manner;

7. Authorizing the Commission to seek monetary penalties and equitable relief in a single civil court action.

Penalties study/guidelines

The bill requires the Commission, within 1 year, to report to Congress on a study of penalties assessed for trade practice violations. The study would——

a. Analyze whether systematic differences exist in penalties assessed by different contract markets and why; and

b. Propose guidelines to assure that contract market and Commission penalties are consistent, including possibly minimum penalties or penalty ranges for various offenses.

F. Broker associations

The bill requires disclosure to the exchange and the Commission of all trade, business, or financial partnerships, cost-, profit-, or capital-sharing agreements, or other known, formal arrangements, among or between floor brokers and traders. Beginning in 270 days, trading among broker-group members involving customer order executions is barred unless either the Commission adopts rules governing such trading which it certifies to Congress will inhibit abuses or the contract market implements remedial rules.

Oral orders

The bill provides that, within 270 days, the Commission must adopt rules requiring a contemporaneous written record be made for all member-for-member orders for execution on the floor.

G. Undercover investigations

The bill authorizes the Commission to conduct limited undercover investigations where it has reason to believe that violations of the Commodity Exchange Act may be taking place and the Justice Department has declined to do so. The bill further requires the Commission to inform the Department of Justice before initiating any such investigation and that, in conducting the investigation, the Commission would work with other relevant law enforcement officials as appropriate.

H. Floor trader registration

The bill defines the term "floor trader" and requires registration of such floor traders with the Commission. The registration process would include fingerprinting and FBI background investigations.

I. Assistance to foreign futures authorities

The bill authorizes the Commission to assist futures authorities of foreign countries by conducting investigations on their behalf without regard to whether the facts stated in their request constitute a violation of U.S. law.

The bill defines the term "foreign futures authority." The bill also provides the authority for the Commission to provide investigative assistance to foreign futures authorities including the collection of information and evidence. The Commission may accept payment and reimbursement for necessary expenses incurred in carrying out any investigation pursuant to this authority.

J. Risk assessment for holding company systems

The bill empowers the CFTC to require futures commission merchants to provide information on the activities of affiliated persons that are reasonably likely to materially affect the financial or operational condition of those firms.

K. GAO access to information

The bill provides the Comptroller General of the United States with the authority to gain access to any information within the control of any contract market, clearinghouse or registered futures association that currently is available to the Commission. GAO may gain access to records relating to open position data made only pursuant to a request of either the House or Senate Agriculture Committees.

L. Interests of agricultural producers

The bill requires the Commission to consider and endeavor to serve the interests of agricultural producers in discharging its duties and functions under the Act.

M. Suspension of registrants charged with felonies

The bill modifies section 8a to authorize the Commission, pursuant to rules, regulations or orders as may be adopted, to suspend or modify the registration of any person under the Act who is charged with a violation of the Act or a violation of any Federal or State law punishable by imprisonment for a term exceeding 1 year that would reflect on the honesty or fitness of the person to act as a fiduciary.

The bill requires the registrant to be afforded an opportunity for a hearing prior to such suspension or modification of registration.

N. Insider trading

The bill establishes as a felony, for an employee, board member or member of any committee of a board of trade, contract market or registered futures association, in violation of Commission rules, to trade upon or disclose for purposes inconsistent with such persons official duties, any material nonpublic information gained through the performance of such official duties.

O. International competitiveness of electronic trading

The bill directs the Commission, consistent with its responsibilities under section 18, to facilitate computerized trading as an adjunct to open outcry auctions systems.

The bill also directs the Commission to cooperate with the office of the U.S. Trade Representative, the Treasury Department, the Department of Commerce and the Department of State to remove foreign trade barriers to the international use of electronic trading systems.

P. Telemarketing fraud

The bill amends section 17(p) to require registered futures associations to adopt guidelines concerning the solicitation by telephone of new futures or options accounts.

Q. Venue; service of process

The bill amends section 22(c) to authorize for private actions under section 22(a) service of process in any district where the defendant is an inhabitant or is found. Any action under section 22(a) may be brought in any district the defendant is found, is an inhabitant, or transacts business; or in the district in which any act or transaction constituting the violation occurred.

R. Information procedures for persons affiliated with certain registered persons

The bill directs the Commission to consult with the Securities Exchange Commission in the development of information procedures with respect to persons affiliated with registered persons.

S. Study of delivery points

The bill directs GAO to conduct a study of delivery points regarding contracts of sale for future delivery of agricultural commodities. The study must include an examination of the feasibility and relative merits of cash delivery for agricultural contracts and the special concerns raised by the presence of multinational firms with global delivery needs in these markets.

T. Ethics training/National Futures Association

The legislation requires that futures industry professionals attend periodic ethics training sessions.

Finally, the legislation incorporates two proposals by the National Futures Association to tighten registration standards and to allow NFA to appeal certain rulings of the Commission.

TITLE III—INTERMARKET COORDINATION

A. Margin on stock-index futures

The bill empowers the Board of Governors of the Federal Reserve System to direct an exchange to adjust its margins on stock-index futures contracts (or options thereon) to levels which the Board finds appropriate to preserve the financial integrity of the exchange or its clearing system or to prevent systemic risk.

B. Exemptive authority

The bill grants the Commission the authority to exempt any agreement, contract, or transactions from most Commodity Exchange Act restrictions where the exemption is consistent with the public interest. Before exempting any futures instrument from the requirement that it trade on a designated contract market, the Commission must also determine, among other things, that the instrument would be entered into solely among institutional participants and in connection with a line of business or for hedging or risk management.

Swaps

The bill clarifies that the Commodity Exchange Act does not apply to swap transactions entered into for hedging or business-related risk-management and where each party expects to make specified payments under the arrangement. It requires that the Commission exempt certain additional swaps and bank deposits to the extent they may be considered to be subject to regulation under the Act and that the exemption is not contrary to the public interest.

C. Hybrid commodity instruments

The bill codifies a new "functional" approach to resolving jurisdictional disputes over new hybrid commodity instruments. Products would fall inside or outside CFTC regulation based on whether the commodity-based portion of the return on the instrument is more or less than 50 percent.

D. Index participations

The bill provides that index participations approved by or proposed to the Securities and Exchange Commission before December 31, 1990, are permitted to trade on stock exchanges. The CFTC is directed to utilize existing authorities to facilitate the registration of certain registered securities industry professionals for purposes of marketing stock index futures products to the public.

COMMITTEE CONSIDERATION

S. 1729—FUTURES TRADING PRACTICES ACT OF 1989

During the 101st Congress, the Committee conducted five hearings and meetings to examine futures trading practices leading up to the October 14, 1989, introduction of S. 1729, the "Futures Trading Practices Act of 1979." The Committee then heard from 21 witnesses during 2 days of hearing testimony specifically on that bill. S. 1729 was reported unanimously from the Committee at a markup session on November 2, 1989. (See Senate Report 101-191.)

Titles I and II of S. 207 as introduced are substantially identical to Division A of S. 1729 as reported from the Committee.

S. 207—FUTURES TRADING PRACTICES ACT OF 1991

The Committee held 2 days of hearings on S. 207 following the bill's introduction on January 14, 1991. In this process, the Committee heard oral testimony from 18 witnesses representing the

principal Federal financial regulatory agencies, the agricultural community, the futures industry, and the securities industry. The Committee also received written submissions from the General Accounting Office, the American Bar Association Committee on Commodities, the North American Securities Administrators Association, the National Futures Association, the Office of Thrift Supervision, plus several other futures, securities, and swap industry organizations.

HEARINGS

February 7, 1991 hearing

The Committee held its first hearing on S. 207 on February 7, 1991. Chairman Leahy, in his opening statement, said that it was time to stop fighting over jurisdiction for stock index futures. It was essential to maintain confidence in the financial markets, he said, noting that the Persian Gulf War had dramatized the need for market integrity. What was needed, Chairman Leahy said, was tighter enforcement by a toughened CFTC, better exchange audit trails, and more public participation in exchange decision-making. He also noted that previous reform legislation had been blocked because of the jurisdictional conflict.

Chairman Leahy noted that S. 207 was a compromise which had a chance of passing on the Senate floor. S. 207 was supported by key leaders of both the Banking and Agriculture Committees, he said, and indicated that he hoped that it would move quickly through Committee and to the floor.

Ranking Minority Lugar noted that Committee action to reauthorize the CFTC had been completed in the last Congress, and that the jurisdiction debate had held up the bill. Senator Lugar stressed that no Senator can block such action indefinitely. CFTC reform was extremely important to investor confidence and the health of our financial markets, he said, pointing to dual trading reforms, trading card guidelines, improved audit trails and enhanced exchange surveillance by the CFTC and the futures industry.

The first panel to testify included Robert R. Glauber, Undersecretary of the Treasury; Wendy L. Gramm, Chairman of the Commodity Futures Trading Commission; Alan Greenspan, Chairman of the Board of Governors of the Federal Reserve System; and Richard Breeden, Chairman of the Securities and Exchange Commision.

Mr. Glauber congratulated the Committee on its work on titles I and II in the bill, saying that the administration supported the titles and would submit technical comments. Mr. Glauber said he would focus his remarks on Title III. He noted that the compromise presented in title III did not contain the administration's proposal for unified regulation of equity-related markets but preserved other important elements of the proposal in modified form. Title III fell short of the comprehensive reform that was needed, he said, preferring the administration's proposal to resolve regulatory fragmentation.

Mr. Glauber cited the recent decline in individual investor confidence. He said that the President's 1987 Task Force on Market Mechanisms had concluded that stocks and stock-index futures

were "one market," and that the regulatory system had not kept pace with this reality. He said the single most important step Congress could make to reduce the chances of a major market disruption was to unify regulation of the "one market." He said that fragmented regulation had impeded progress on coordination of fundamental intermarket mechanisms, had caused intermarket enforcement problems, and had impeded innovation. The administration would resubmit the Capital Markets Competition, Stability, and Fairness Act in the new Congress, he added.

The administration's bill, Mr. Glauber said, would transfer the authority to regulate stock-index futures from the CFTC to the SEC, would give the SEC oversight authority over margins on stock index futures, and would modify the exclusivity clause of the CEA to end costly and anticompetitive legal disputes over what constitutes a futures contract. Mr. Glauber said that the bill would not create regulatory gaps outside of the SEC's enforcement powers.

CFTC Chairman Wendy L. Gramm opened her testimony by saying that it was time to reauthorize the CFTC and resolve the jurisdictional debate. She described several steps that the CFTC had taken on its own to address issues raised in titles I and II of S. 207: a proposed restriction on dual trading; a study of broker associations; a review of exchange audit trails and specific recommendations to exchanges; the adoption of rules to prevent alteration of trading cards and records; the implementation of rules to bar serious disciplinary offenders from serving on exchange committees and boards; work with exchanges to improve record-keeping for oral orders; creation of a task force to expand Commission floor surveillance; and an analysis of grain and soybean contract delivery points.

Chairman Gramm said that the CFTC supported certain new statutory amendments and exemptive authority over certain instruments. She said that reauthorization of the CFTC should be treated separately from the jurisdictional debate and voiced her concerns about title III of S. 207.

Chairman Gramm said that she believed the existing futures margining system worked well, that exchanges needed the flexibility to change margins as quickly as necessary. The CFTC, not the Fed, she said, was the best regulator of margin in the futures markets should Congress choose to assign one. Chairman Gramm opposed rescinding the CFTC's exclusive jurisdiction. The public is more comfortable with futures traded as futures, not as securities, she argued. She stressed that futures were different from securities and thus regulation should be treated differently.

Chairman Gramm said that the CFTC was developing language to provide regulatory certainly and consistency for innovative hybrid financial instruments. Under her proposal, hybrids would be reviewed and a determination would be made whether it should be regulated as a future or option, she said. Under the plan, the CFTC would regulate any hybrid where the investor's primary purpose was to profit through commodity price fluctuations.

Ms. Gramm said the Commission generally concurred with the intent of title III concerning directives on intermarket issues, but noted that many significant actions had already been taken in these areas. Ms. Gramm concluded by supporting the enactment of

trading abuse reforms, but that the reform should not impair the ability to regulate new products.

Federal Reserve Chairman Alan Greenspan complemented the Committee on its contributions toward strengthening the regulatory system.

With regard to margin setting, Chairman Greenspan said that the Fed thought that the exchanges and self-regulatory organizations were well positioned for developing and refining margin policy, but that Federal oversight was important to ensure that margins on stocks and stock index futures were adequate to protect against a wide range of conditions. He said that oversight authority should rest with either the CFTC or the SEC, rather than the Fed, since either agency could bring to bear appreciably more day-to-day information important when choosing appropriate margin levels.

Chairman Greenspan said that the Fed had serious concerns about the current interpretation of the Act that required any contract with an element of futurity to be traded only on a CFTC-regulated exchange. He said that S. 207, by giving CFTC authority to exempt certain products, took a positive step to avoid such conflicts and that the proposal would limit court disputes. Chairman Greenspan concluded that the proposed bill should reassure the markets that financial innovations and new products would not be curbed by regulatory ambiguities.

SEC Chairman Richard Breeden began his testimony by saying that S. 207 was a serious and meaningful potential compromise to difficult issues. He said that regulatory fragmentation seriously weakened the ability to detect and prosecute intermarket fraud. He said that the SEC shared a common interest with Chairman Leahy and Senator Lugar in strengthening protections against futures market fraud.

Chairman Breeden said that the current fragmented system undermined the competitiveness of securities markets through needless litigation. This fragmentation saddled U.S. firms and investors with unnecessary costs from complying with two separate regulators, rather than one, he said.

Chairman Breeden said that he and the SEC still supported the administration's proposal on stock-index futures jurisdiction. He argued that the current CFTC exclusivity clause hampered efforts to develop new products and that futures exchanges had used it as a shield against competition. The language of the administration bill would maintain the pre-emptive effect of the exclusivity clause, but would allow products with futures elements to be offered under the securities or banking regulatory systems.

Chairman Leahy asked the panel if they considered the compromise of S. 207 to be a responsible step that the Congress should pursue. Mr. Glauber said that although the Treasury did not oppose the compromise, it would be disappointed if it were all that emerged from Congress. Chairman Gramm said that the CFTC opposed the compromise.

With respect to margin-setting, Chairman Greenspan said that should the Fed be given this authority, there would be an inclination for day-to-day margin-setting to be performed by the SROs. Mr. Greenspan said that he did not believe margins to be a system-

ic problem, except in rare circumstances, which was why he thought Federal oversight was necessary.

Chairman Leahy asked Chairman Gramm how index participations would be affected by the CFTC's forthcoming proposal. She said that IPs would come under CFTC jurisdiction since they were futures, but that she would favor grandfathering certain IPs that had been proposed for SEC approval before the end of 1990.

Chairman Leahy asked what would prevent instruments near the edge of the grandfather clause from becoming involved in lawsuits. Chairman Gramm said that if a grandfathered instrument changed its structure, it would potentially go to the CFTC for a special exemption. Chairman Breeden argued that grandfathering did not solve the problem since many financial products have elements of futurity.

The second panel of witnesses to testify included Michael Dunn, Vice President of Legislative Affairs of the National Farmers Union; Jack Frick, Chairman of the Futures Committee of the National Cattlemen's Association; Paul Krug, Vice President and Regional Manager of Continental Grain Company; and Diane Klemme, Vice President and Director of Member Services of Grain Services Corporation of Atlanta.

Mr. Michael Dunn said that S. 207 assured the financial wherewithal of the CFTC to be an efficient and effective agency. He said implementation of industry service fees was a fair way to finance necessary oversight. He said that the "sunshine" provision was the most important one in S. 207, and he encouraged the establishment of a CFTC position to be filled by a representive of general purpose farm organizations.

Mr. Jack Frick said that he and the Cattlemen's Association generally supported S. 207, especially titles I and II designed to strengthen the CFTC. With respect to Title III, he said he shared the underlying philosophy of the provisions but believed that built-in higher margins would put U.S. exchanges at a competitive disadvantage. Mr. Frick said that he supported stronger Federal oversight over futures margins, vested in the CFTC. With regard to jurisdiction, he said that new products should be permitted to trade under the regulatory scheme that worked the best, although he said that he did not share the Committee's confidence in how the SEC would interpret and implement the provision. Finally, Mr. Frick said that the Committee's approach to the jurisdiction issue would inevitably weaken the CFTC.

Mr. Paul Krug supported many goals of S. 207, but was concerned by the provisions on service fees, margin authority and exclusivity. He said the National Grain Trade Council opposed moving authority over stock-index futures margins to the Fed, noting the futures exchanges should retain that authority. He argued that the bill's exclusivity clause provision would set the stage for futures substitutes that would be traded over-the-counter and outside the Act and would weaken the CFTC. Mr. Krug concluded that self-regulation of the futures industry did the best job of protecting market participants.

Ms. Diane Klemme said that she and Grain Service Corporation believed all futures markets should be regulated by a strong and independent regulatory body and that the CFTC had proven its

ability to regulate effectively while allowing markets to perform their economic functions. She said she believed margin-setting authority should continue to be vested in exchanges. She argued that across-the-board transaction fees were inequitable. In closing, Ms. Klemme suggested that S. 207 did not resolve the jurisdictional dispute, and that that the bill would weaken the CFTC over time.

CFTC proposal

On February 19, Chairman Gramm, on behalf of the CFTC, submitted a proposal (the "CFTC proposal") covering principal issues addressed in title III of the bill, specifically: (1) margin on stock-index futures, (2) exemptive authority, (3) hybrid commodity instruments, and (4) index participations. On February 20, Chairman Gramm submitted a section-by-section explanation to accompany the proposal.

February 20, 1991 hearing

The Committee held a second hearing on S. 207 on February 20, 1991, to receive testimony from representatives of the affected industries. Senator John Heinz of Pennsylvania opened the hearing by presenting testimony on title III. Senator Heinz stated that he supported the bill overall and title III in particular. Title III, he noted, was the product of a bipartisan effort of Senators from the Banking and Agriculture Committees. He said that it was a compromise intended to strengthen, not weaken, existing legislation on capital markets.

Chairman Leahy, in his opening statement, similarly stressed that S. 207 was indeed a compromise reached by leaders of the Banking and Agriculture Committees which addressed legitimate needs and concerns of groups on all sides of the debate.

Ranking Minority Member Richard G. Lugar, in his opening statement, said that he saw a need for an overall view of margin requirements, and that reaching a compromise addressing the other components of title III was more problematic.

John M. Damgard, president of the Futures Industry Association, was the first witness to testify. Mr. Damgard stated that he and FIA did not support the proposal in title III of the bill to grant the Federal Reserve Board authority over stock-index futures margins. Raising or lowering those margins inappropriately would force futures investors to other markets or expose exchange clearinghouses to excessive risks. Mr. Damgard said exclusive jurisdiction for futures products should be retained by the CFTC, but that the CFTC and the SEC should be directed to devise a coordinated plan for trading instruments which might constitute both futures contracts and securities. Mr. Damgard supported the provision in section 303 which grants the CFTC exemptive authority for off-exchange products, including swaps.

With respect to a proposal by Chairman Gramm, Mr. Damgard stated that allowing the CFTC to grant exclusions from the Futures Commission Merchant (FCM) and introducing broker definitions was unnecessary and potentially risky. He supported the proposal authorizing the CFTC to obtain information regarding FCM affiliate activities and also supported the proposal permitting the CFTC to seek injunctive relief and civil monetary penalties in the

same Federal court action, but he suggested that a tiered penalty structure should be implemented.

Mr. Damgard said he thought the CFTC's proposed alternative to title III was quite good, although he had not had much time to study it.

Jack Sandner, Chairman of the Chicago Mercantile Exchange, testified next. Although he agreed with the principles of S. 207 to improve the integrity of financial markets, he cited several areas of need to improve the bill. Mr. Sandner outlined steps taken by the futures industry, independently of the CFTC, that have improved the integrity of these markets. Mr. Sandner opposed transfer of margin-making decisions to the Federal Reserve Board, stating that the exchanges have consistently changed margins expeditiously, and referenced the Persian Gulf situation as a prime example.

Mr. Sandner opposed reduction of CFTC jurisdiction over new instruments, specifically hybrid products. He suggested that the hybrid proposal could recreate the jurisdictional uncertainty of earlier years and could result in increased litigation. Mr. Sandner said there were sound reasons to give the CFTC authority to exempt certain transactions from the exchange trading requirement, but expressed concern about provisions that could give more favorable treatment to swaps. In conclusion, Mr. Sandner said that although his industry has been subjected to intense scrutiny by government agencies, they have been able to survive and prosper. Mr. Sandner did not agree with the CFTC's margin provisions or jurisdiction regarding index participations; he agreed with the CFTC's proposal regarding exemptive authority, hybrids and swaps, and supported the registration provision.

William O'Connor, Chairman of the Chicago Board of Trade, testified next. Mr. O'Connor expressed concerns about titles I and II of the bill, saying that increased fees for exchange members and market users could erode fragile profit margins and force customers to other less-costly markets. He strongly opposed title III saying that the margin provision was unnecessary and impractical. Mr. O'Connor opined that title III would cause confusion and expensive litigation. Mr. O'Connor said that he was not opposed to swaps, but he did oppose allowing a duplicate futures market to operate without the same regulatory requirements as other futures contracts. Mr. O'Connor did not believe that the SEC should have jurisdiction over index participations. He supported the registration proposal put forward by the CFTC.

Mr. Dale Lorenzen, Co-Chair of the joint CBT-CME AUDIT committee, gave a brief history of the electronic audit trail and discussed the progress of the AUDIT project. He explained that the AUDIT committee had decided the hand-held unit should weigh less than 1 pound, with no wires and a 10 hour battery life. If a handwriting device was used, it should be nontethered; the device should transmit information on 30 trades per second per pit to the central clearinghouse. At the end of the day the internal memory of the unit would be downloaded and checked against trades at the clearing firm to see if discrepancies existed.

Mr. Lorenzen said that AUDIT was an important project and that the joint committee was attempting to tie its development to

regulatory and exchange requirements so that it would have more universal applications on a timely basis.

Mr. Z. Lou Guttman, Chairman of the New York Mercantile Exchange, indicated his concern in the possibility of energy futures margin oversight by anyone other than NYMEX. Mr. Guttman explained that flexibility in setting margins was necessary for regulatory as well as competitive reasons, and that less flexibility or higher margins could result in business moving to other markets, particularly to London. With respect to hybrid instruments, Mr. Guttman stated that altering the CFTC's exclusive jurisdiction would compromise the effectiveness of the regulatory and surveillance systems now in place.

Mr. Robert L. Isaacson, Principal for Commodity Investment Consultants, testified as Chairman for the National Association of Futures Trading Advisors. He supported the provision in S. 207 for enhanced exchange audit trails. He said that service fees should be shared by all people involved in futures markets, not just exchange members. Mr. Isaacson opposed shifting jurisdiction of stock-index futures margin from the CFTC to the SEC or the Federal Reserve Board. He also voiced concern about limiting the CFTC's exclusive jurisdiction. Mr. Isaacson noted that giving the CFTC exclusive jurisdiction was one of the most insightful things Congress did for futures markets regulation.

Mr. Wayne P. Luthringshausen, Chairman of the Options Clearing Corporation representing the Ad Hoc Coalition for Intermarket Coordination, testified next. Mr. Luthringshausen stressed the importance of investor confidence in the financial markets. The fragmented regulatory structure for stocks and related futures, he said, had undermined market competitiveness and had prevented coordinated margin rules. He opined that the exclusivity clause created a monopoly for futures exchanges that blocked product innovation. Mr. Luthringshausen said he could not support title III because it did not address the issue of unified regulation of stock-index futures and because the exclusivity provision was ambiguous.

Chairman Leahy asked Mr. Luthringshausen what suggestion he had to improve the S. 207 provision on hybrid products such as index participations, short of a transfer of stock-index futures jurisdiction to the SEC. Mr. Luthringshausen responded by saying that title III was too ambiguous and subject to lawsuit.

Mr. Joseph R. Hardiman, president and CEO of the National Association of Securities Dealers, also testified for the Ad Hoc Coalition on Intermarket Coordination. He stated that title III did not go far enough in addressing threats to the equity markets due to divided regulatory jurisdiction and lack of coordinated margin-setting. He stressed the need for a coordinated approach to setting margins for stocks, stock-index futures, stock options, and stock-index options. He suggested that the Committee look to the administration's proposal to promote safety and soundness of securities markets.

Mr. Marc Lackritz, executive vice president and director of government relations of the Securities Industry Association testified accompanied by William Breck, executive vice president of Shearson Lehman Brothers. Mr. Lackritz stated that he strongly supported the administration's proposal, arguing that it created an effec-

tive regulatory structure to maintain the integrity and stability of U.S. capital markets. He said he supported the title III providing calling for coordinated Federal oversight of margins for stock-index futures under the Federal Reserve Board.

Chairman Leahy asked the panel to explain why securities exchanges, which own futures subsidiaries, have refused to trade their index participations as futures contracts under the CFTC. Mr. Hardiman explained that customers of many wire houses would be more comfortable with the instruments as securities under the securities regulatory system.

Mr. Lackritz said that index participations were designed for the retail market, while futures markets were geared more for institutional market users.

Senator Lugar asked how the jurisdictional dilemma could be solved short of moving toward one regulator for equities and futures. Mr. Hardiman suggested that a referee, possibly the President's Working Group on Financial Markets, could be structured to resolve conflicts.

MARKUP

On March 6, 1991, the Committee held a business meeting to mark up S. 207. Chairman Leahy opened the meeting by saying that he and ranking minority Member Lugar had spoken with Secretary of Treasury Nicholas Brady, and CFTC Chairman Gramm concerning S. 207 and that staff would present a package of proposed revisions to title III of the bill. Committee Special Counsel Kenneth Ackerman then gave a verbal explanation of the revisions.

Counsel Ackerman explained that, among other things, under the new language, the Federal Reserve would have authority to set margins on stock-index futures contracts in order to preserve the financial integrity of the contract market or its clearing system or to prevent systemic risk. He said the Fed may delegate its authority solely to the CFTC. Day-to-day margin-setting would remain with the individual exchanges.

With regard to exemptive authority, language similar to that originally proposed by the CFTC would be substituted for the language in S. 207. The CFTC could exempt any agreement contract or transaction where the exemption was consistent with the public interest and satisfied other criteria.

On index participations, the new language would reflect that proposed by the CFTC. IPs that had been approved by or submitted to the SEC prior to 1991 would be excluded from the Commodity Exchange Act.

Similarly on swaps, the language in title III would reflect the proposed alternative of the CFTC. Some swaps would be excluded from the Commodity Exchange Act; certain others would be exempted by the CFTC.

Chairman Leahy also proposed three amendments to title II of the bill related to risk assessment for holding company systems, monetary penalties in civil court actions, and reorganization of section 2(a)(1)(A) of the Commodity Exchange Act.

The Committee agreed to report favorably S. 207, along with the modifications described above, by voice vote.

Senators Lugar and Cochran voiced their approval of the bill as revised. Senator Conrad noted that he had intended to offer an amendment on conflicts of interest, but had decided against raising the amendment since it might create difficulties for smaller exchanges. Senator Conrad said that he would like to work on report language to send a clear message of the Committee's intent on this issue. Chairman Leahy suggested that the staff work out the language.

ROLLCALL VOTES

In accordance with paragraphs 7(b) and 7(c) of Rule XXVI of the Standing Rules of the Senate, it is announced that there were no rollcall votes in the Committee on S. 207.

SECTION-BY-SECTION ANALYSIS—FUTURES TRADING PRACTICES ACT OF 1991

Section 1. Short title

Section 1 provides that this Act may be cited as the "Futures Trading Practices Act of 1991" and sets forth the contents of the legislation.

Section 2. References to the Commodity Exchange Act

Section 2 provides that, unless provided otherwise, wherever in this Act an amendment or repeal is expressed as an amendment or repeal of another provision, the references shall be considered as made to the Commodity Exchange Act.

TITLE I—AUTHORIZATION OF APPROPRIATIONS

Section 101. Commodity Futures Trading Commission; Funding and Personnel

Section 101 revises section 12(d) of the Commodity Exchange Act to authorize appropriations to carry out its provisions as follows: for fiscal year 1992, $48.3 million; for fiscal year 1993, $56.1 million; for fiscal year 1994, $61.9 million; for fiscal year 1995, $68.2 million; and for fiscal year 1996, $71.9 million.

The added resources are intended to make possible greater Commission presence on trading floors, strengthen the oversight of exchange self-regulatory programs, heighten the monitoring of computer technology, and provide more staff to develop and prosecute enforcement actions.

The Commission is a "permanent" Federal agency, and the 5-year authorization will give it a chance to put needed reforms in place. The Committee will continue to hold periodic oversight hearings on the Commission's progress in this effort in the future and will make any legislative changes needed.

Section 102. Hiring and Compensation Authority of Commission

Section 102 amends section 12(b) of the Commodity Exchange Act to add a new subsection (4)(A) to give the Commission authority to fix the compensation and number of, and to appoint and direct, em-

ployees of the Commission, without regard to the provisions of chapter 51 or subchapters III and IV of chapter 53, and chapter 54 of title 5, United States Code, which govern the classification and pay rates of officers and employees of the Federal Government.

Section 102 also adds a new subsection 4(B) to section 12(b) of Act to give the Commission authority to provide additional compensation or benefits to its employees if the same type of compensation or benefits are then being provided, or could be provided by any Federal bank regulatory agency. The Commission is directed to seek to maintain comparability with the Federal bank regulatory agencies identified in the legislation.

Section 102(b) directs the Commission to issue and submit to Congress proposed regulations to implement the new authority provided in this section. Section 102(c) provides that these regulations will become effective on the later of 30 legislative or 90 calendar days after their submission to Congress.

Section 102 is designed to enhance the Commission's ability to recruit and retain personnel. The Commission has had particular problems in doing so in the financial centers around the country in which the Commission has offices. Under this authority, benefits could be provided either in addition to, or instead of, benefits available under title 5 of the United States Code to Federal employees generally.

Section 103. Service Fees

Section 103 directs the Commission, after notice and opportunity for a hearing, to promulgate a schedule of appropriate fees to be assessed against persons benefitting from services rendered and activities and functions performed by it in conjunction with its administration and enforcement of the Act. Such fees would reflect the cost to the Commission of—

(A) Monitoring trading on floors of designated contract markets to detect and deter violations of the Act;

(B) Supervising contract markets, leverage transaction merchants, registered futures associations, and other registrants to ensure compliance with self-regulatory standards established under the Act;

(C) Analyzing and designating new futures, option, and leverage contracts; and

(D) Such other services, activities, and functions as the Commission finds appropriate for such fees.

The Committee intends that service fees adopted by the Commission under new section 12(f) would cover a wide range of functions central to its supervision of trading practices and contract market self-regulation—items at the heart of the Committee's concerns in the development of this bill. As a result, the Committee expects that fees based on such functions could reflect much or all of the increase in Commission spending authorized under this Act.

The Commission would structure the new fees to reflect specific services it performs, as it does now with respect to its current fees charged to contract markets and others for rule enforcement reviews and approval of new trading products.

The total amount of fees assessed under this subsection may not exceed $3.9 million in fiscal year 1992; $7.8 million in fiscal year

1993; $13.8 million in fiscal year 1994; $20.8 million in fiscal year 1995; and $21.7 million in fiscal year 1996.

In promulgating a schedule of appropriate fees under this section, the Commission may consider phasing in any new or increased fees in light of considering (A) the immediate impact on the Federal budget of increasing the size and scope of the Commission and (B) the burden of other reasonable costs being borne by persons being assessed such fees for purposes of coming into compliance with the standards of new section 5a(b).

TITLE II—FUTURES TRADING PRACTICES

Subtitle A—Floor Surveillance and Dual Trading

Section 201. Duties of Contract Markets

Section 201 designates the current section 5a of the Commodity Exchange Act as subsection 5a(a) and adds a new subsection 5a(b). The new paragraph 5a(b)(1) creates an affirmative duty for each contract market to maintain and utilize a system to monitor trading to detect and deter violations of its rules and regulations committed in the making of trades and execution of customer orders on its floor or subject to its rules. This system must include:

(A) Physical observation of trading areas (which could include, in addition to the stationing of compliance staff in trading areas, the use of video recording or other monitoring technologies);

(B) Audit trail and recordkeeping systems able to capture essential data on the terms, participants, and sequence of transactions (including relevant data on unmatched trades and outtrades);

(C) Systems capable of and used to review trading data on a regular basis to detect relevant violations;

(D) The use of information gathered through such system on a consistent basis to bring appropriate disciplinary cases against violators;

(D) The commitment of necessary resources, including adequate staff to develop and prosecute disciplinary actions; and

(E) The assessment of meaningful penalties against violators.

The new section 5a(b)(1)(C) requires contract markets to maintain systems to detect and discipline violations other than those related to dual trading only "to the extent feasible as determined by the Commission." A higher standard is imposed, however, for violations which are indeed attributable to dual trading. If it is not feasible for a contract market to detect dual trading-related violations on its floor, then the Committee envisions that the Commission may initiate remedial procedures under new subsections 8e(b) or 8e(c) as appropriate.

The new paragraph 5a(b)(2) requires that the audit trail system of each contract market must accurately record (A) the times of trades in increments of no more than 1 minute in length, thus codifying the standard in Commission regulation 1.35(g), and (B) the sequence of trades for each floor trader and broker, consistent with Commission regulations. The Committee takes this step to empha-

size its concern that this standard be adhered to by contract markets and overseen rigorously by the Commission.

Audit trail technology

New subsection 5a(b)(3) establishes audit trail performance standards which take effect beginning 3 years after the date of enactment of this section.

Trade execution data

Beginning in 3 years, the audit trail system of each contract market must, for all trades, record accurately and promptly the essential data on terms, participants, and times required by the Commission by rule, including the time of execution. This "essential data" would include the price, quantity, time, opposing floor trader or floor broker, and other elements enumerated in Commission Rule 1.35 which the Commission finds applicable.

Such recording must be through a means that records data in a form which cannot be altered except in a manner that will leave a complete and independent record of such alteration, and which continually provides such data to the contract market.

The Committee intends that data be considered "continually provide[d] * * * to the contract market" not only if such data is physically transmitted from a floor trader's hand-held device to a central exchange facility, but also if the device stores data internally on a card, disc, or other medium which cannot be tampered with by the person entering such data and is thus within the control of the contract market. Floor brokers or floor traders must enter trading data on a substantially contemporaneous basis, taking into account the floor broker's duty to get the best execution for his customer and the floor trader's role in providing liquidity to the market. The Committee understands that the exigencies of trading may require a floor broker executing customer orders to enter certain trading data following a series of trades and, as soon thereafter as practicable, to enter the balance of the essential data required.

The recording method must identify the time of execution, to the extent practicable as determined by the Commission, (I) independently of the person making the trade, (II) through a mechanism that records the time automatically when entered by the person making the trade, or (III) through such other means that will capture a similarly reliable time.

By qualifying certain standards under this paragraph as being "to the extent practicable," the legislation gives the Commission the flexibility to make these judgments on a by-contract-market basis or otherwise. It thereby allows the Commission to work with exchanges to develop achievable, individualized methods, as it determines appropriate, to comply with those standards, beyond 3 years. The Commission will consult with each contract market in developing systems to comply with the requirements of this paragraph. In determining what is "practicable" in any given situation, the Commission may, for instance, consider the cost of implementing the system or subpart, the effectiveness of reasonable alternatives proposed by the contract market in achieving a precise and independent audit trail to protect public customers against viola-

tions of this Act and exchange rules, and the need to avoid disruptions in trading and any harm to the public interest in hedging and price-basing, and whether the system or any subpart threatens the competitive position of any contract market in the international market place. This assessment of practicability should also reflect the Committee's intent that the audit trail systems required under this paragraph be compatible with the system of "open outcry" trading currently prevalent in U.S. futures markets.

The recording method must be adequately precise to determine, "to the extent practicable" as discussed above, the sequence of all trades by each floor trader and each floor broker.

Other audit trail data

The new subparagraph 5a(b)(3)(B) requires that, for customer orders, the audit trail system at each contract market must record the time that each such order is (1) received on the floor of the board of trade, (2) received by the floor broker for execution (or transmitted to the floor broker in an extremely rapid manner), and (3) reported from the floor of the board of trade as executed. All elements of the requirement under this subparagraph are qualified as being "to the extent practicable as determined by the Commission" as discussed above.

Such recording must be through a means that records such times in a form which cannot be altered except in a manner that will leave a complete and independent record of such alteration; which continually provides such data to the contract market; and which identifies such times (I) independently of the person making or processing the order, (II) through a mechanism that records the time automatically when entered by the person making the trade or processing the order, as appropriate, or (III) through such other means as will capture a similarly reliable time. It must be adequately precise to determine (I) the sequence in which, for each futures commission merchant, floor broker, or member firm, as applicable, all orders are received on and reported from the floor of the contract market and (II) the sequence in which orders are received by each floor broker for execution.

New paragraph 5a(b)(4) authorizes the Commission, by rule, to establish standards under which the audit trail systems required under paragraph 5a(b)(3) shall record, to the extent practicable, (A) the sequence of all trades made by all floor traders and all floor brokers, and (B) the interval between the time of receipt and the time of execution of each order by the floor broker. Rules adopted under this subparagraph would become effective 30 legislative days or 90 calendar days, whichever is later, after they are submitted to Congress.

Exemptions

New paragraph 5a(b)(5) authorizes the Commission to make appropriate exemptions from the audit trail requirements of paragraph 5a(b)(3) in two situations. First, it may make exemptions for an exchange with respect to which the Commission finds that (i) the volume of trading at such exchange is relatively small and the exchange has demonstrated substantial compliance with the objective of paragraph 5a(b)(3); and (ii) the trade monitoring system at

such exchange otherwise maintains a high level of compliance with this subsection.

The authority for the Commission to exempt contract markets with "relatively small" trading volume is designed to accommodate such exchanges which demonstrate that they are capable of maintaining a highly accurate audit trail without the necessity of excessive automation. It is anticipated that the Commission would work closely with these contract markets to develop systems to accomplish the goals of this paragraph in an effective manner. The Committee intends that the Commission interpret this provision strictly to apply only to smaller exchanges that would suffer unnecessary and disproportionate financial hardship were they required to implement fully the requirements of this section.

Second, the Commission is authorized to make exemptions for categories of customer orders with respect to which it finds that such orders are transmitted to and reported from the trading pit in an extremely rapid manner such that substantial compliance with the objective of paragraph 5a(b)(3) can be otherwise achieved.

This authority is intended to accommodate such practices as "flashing" orders or shouting orders from a telephone stretched virtually to the trading ring where the contract market's system is otherwise capable of capturing audit trail data.

Any exemption granted by the Commission under paragraph 5a(b)(5) would become effective 30 legislative days or 90 calendar days, whichever is later, after submission of such rule or order to Congress.

Section 202. Commission oversight; deficiency orders

Subsection 202(a) adds a new section 8e to the Commodity Exchange Act. A new subsection 8e(a) directs the Commission during the first 18 months after the date of enactment, and on a 2-year cycle thereafter, to assess whether the trade monitoring system at each contract market satisfied new section 5a(b).

Deficiency Orders

The new subsection 8e(b) creates a new system of deficiency orders intended to be an added tool, separate and apart from those which the Commission may already employ, to direct contract markets to satisfy the requirements of new section 5a(b).

The deficiency order system is designed to provide the Commission with an efficient, effective, expeditious tool to require exchanges to make improvements in their trade monitoring systems. It is modeled after existing Commission rulemaking powers to address regulatory weaknesses at individual contract markets, such as the Commission's current authority to require an exchange to "alter or supplement" its rules [section 8a(7)], to set speculative position limits for specific commodities or markets [section 4a(1)], to regulate dual trading by floor brokers on a by-contract-market basis [section 4j(1)], and to order changes in exchange rules regarding delivery points [section 5a(10)]. Like the new deficiency order system, each of these procedures is regulatory in form, not adjudicatory. The Commission, through a deficiency order, would be requiring a contract market to take steps to satisfy a regulatory obli-

gation which already exists by law. As such, the impact of such an order is remedial, not punitive.

The procedure is also designed to dovetail onto existing Commission oversight practices with respect to contract market self-regulation. The Commission staff currently conducts "rule enforcement reviews" of each exchange to assess its compliance with self-regulatory obligations on approximately a 2-year cycle. Based on these reviews, the staff recommends appropriate improvements to each exchange.

The Commission, in its discretion, could still utilize this current practice in lieu of the deficiency order system established under this bill in situations involving nonsystematic or minor deficiencies.

Under new paragraph 8e(b)(1), the Commission would issue a "proposed" deficiency order when it has reason to believe based on its assessment—normally in the context of a rule enforcement review—that the exchange has not satisfied one or more of the requirements of new section 5a(b). Consistent with current practice in rule enforcement reviews, the exchange, which has the best access to its own records, must show that its systems are effective and satisfactory (see, e.g., CFTC rule 1.50).

New subparagraph 8e(b)(2)(A) requires that the proposed order must cite the deficiencies which the Commission has reason to believe exist in an exchange's system along with a statement of the reasons supporting the Commission's belief that those deficiencies exist. The Committee intends that this statement of reasons would include, either as an appendix or as part of its text, a rule enforcement review report as is prepared under current practice or, where a rule enforcement review has not taken place, some other document that similarly would put the exchange on notice of the deficiencies.

Under subparagraphs 8e(b)(2)(B) and (C), the proposed order must also specify the corrective action that the Commission believes that the contract market must take and an acceptable timetable for such corrective action, and a date, not less than 20 days from its date of issuance, when the proposed order will become final, subject to subsection 8e(d).

The remedies available under deficiency orders, set forth in paragraph 8e(b)(3), provide the Commission with great flexibility in fashioning appropriate corrective action to address regulatory flaws. It can direct the contract market to institute appropriate improvements in its trade monitoring system to correct the noted deficiencies; to satisfy objective performance criteria; to upgrade or reconfigure existing systems for collecting or processing relevant data on trading and trader or broker activity, including, where appropriate, the commitment of added resources for such purposes as hiring more staff or deploying new surveillance systems; to suspend the privilege of dual trading in appropriate cases; or take any combination of these steps.

Paragraph 8e(b)(4) authorizes the Commission to issue a proposed order to remove a named officer, director, committee member, or employee at a contract market if it finds, after notice and an opportunity for a hearing on the record prior to such order becoming final, that such person has willfully (A) violated the Commodity

Exchange Act or relevant rules or regulations, (B) abused his or her authority, or (C) without reasonable justification or excuse has failed to enforce compliance with any provision of such contract market's rules by a member or person associated with a member thereof.

Under paragraph 8e(b)(5), the Commission, during the period that a deficiency order is either pending at the Commission or is in effect, would have discretion to refrain from approving new trading products for the affected exchange. In exercising this authority, however, the Commission should be mindful of contract market innovations and, where appropriate, of the benefit to the public interest of encouraging international competitiveness of contract markets.

Paragraph 8e(b)(6) states that the Commission shall not delegate the authority to issue orders under this subsection.

Dual trading

Under new subsection 8e(c), the Commission, in its initial cycle of contract market assessments during the first 18 months after adoption of this section, would focus on whether each contract market's trade monitoring system satisfies the requirements of new section 5a(b) with respect to dual trading-related abuses. The Commission is directed to initiate deficiency order proceedings to suspend the privilege of dual trading on a contract market unless it determines, as part of this assessment, that—

> (A) The trade monitoring system in place at such contract market satisfies the requirements of new section 5a(b) such that it is capable of and is being used to detect and bring appropriate disciplinary actions with regard to violations attributable to dual trading at such contract market, or
>
> (B) There is a substantial likelihood that a dual trading suspension would harm the public interest in hedging and price basing at such contract market, and other remedies under subsection 8e(b) are more appropriate.

As generally with the deficiency order system, the exchange must demonstrate the ability of its system to meet such standards, and, if it fails to do so, the exchange must then demonstrate the potential harm to the public interest in hedging and price basing of a dual trading suspension. In this regard, the Commission should consider the significance of dual trading on the particular contract market since certain markets may have a relatively high proportion of dual traders and dual traders may provide a significant amount of liquidity at such markets.

The Commission is authorized to make appropriate exemptions to a dual trading suspension order to ensure fairness and orderly trading; the Committee encourages the Commission to use this authority effectively.

A dual trading suspension under this subsection would remain in effect until the Commission makes the finding required under paragraph 8e(c)(1). Paragraph 8e(c)(3) directs the Commission to act expeditiously to consider making such finding upon any demonstration by a contract market under paragraph 8e(c)(1).

The Committee emphasizes that neither this provision nor any other provision of this Act either limits or affects the existing au-

thority of the Commission to ban or to regulate dual trading under Section 4j of the Commodity Exchange Act.

Rescission, modification, or delay of orders

Reflecting the status of deficiency orders as a rulemaking function, new subsection 8e(d) provides that the Commission, before any such order becomes final, must provide the affected contract market the opportunity for a hearing consistent with the standards for informal rulemaking under the Administrative Procedure Act (5 U.S.C. 553). In addition, the exchange would have the right, upon request, to an oral presentation of views and comments under terms set by the Commission in answer to the request. The Commission would then be required to rule on the contract market's petition and make appropriate findings as to whether the exchange's trade monitoring system is indeed deficient as noted in the order, and on other matters noted in subsection 8e(d). This process provides the contract market with a full and meaningful opportunity to challenge the proposed deficiency order and its underlying analysis, both as to methodology and the merits of its conclusions.

The Commission may characterize its final decision to require a contract market to take corrective action as a rule, order, determination, or otherwise. Such characterization shall not affect the fundamental nature of the process leading to the decision as a rulemaking for purposes of the Administrative Procedure Act.

Penalties

Violation of a final deficiency order issued under subsection 8e(d) is considered in violation of a Commission order for purposes of (1) establishing liability and assessing penalties against a contract market or any director, officer, agent, or employee thereof under section 6b or (2) initiating proceeedings under section 5b or 6(a).

Judicial review

Although limited to a United States Court of Appeals, judicial review of deficiency orders under subsection 8e(f)(2) is on the same terms as other rulemaking proceedings under the Administrative Procedure Act, including the opportunity to apply for a stay where appropriate. As such, a United States Court of Appeals could set aside an order where it finds the order or its underlying findings and conclusions to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observation of procedure required by law. (5 U.S.C. 706(2)(A)–(D)).

The Committee recognizes that the authority under new subsection 8e(4) to remove a named exchange officer, director, committee member, or employee is adjudicatory in nature. A person's livelihood may be at stake; specific findings of misfeasance are required. For this reason, actions under this provision would require a hearing on the record and judicial review under standards applicable to Commission enforcement cases.

Reports

Paragraph 8e(g)(1) requires the Commission, within 3 days of issuing any proposed or final deficiency order or any finding with respect to dual trading under paragraph 8e(c)(1), to report to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate on such order, including a description of—

(A) the contract market involved;

(B) the deficiencies alleged in the trade monitoring system at such contract market; and

(C) the remedies sought by such order.

Paragraph 8e(g)(2) requires the Commission to report annually to such Committees on actions it has taken to carry out section 8e, including a description of—

(A) its findings with respect to each trade monitoring system at a contract market which it has examined during such period, and

(B) any proposed or final deficiency orders it has issued under this section during such period, including an analysis of the remedies imposed against, and the corrective action taken by, the relevant contract market.

Subsection 8e(h) defines "dual trading" under this section as meaning the execution of customer orders by a floor broker on any trading day during which the floor broker has executed any trade in the same contract market for—

1. the account of the floor broker;

2. an account for which the floor broker has trading discretion; or

3. an account controlled by a person with whom such broker is subject to trading restrictions under new subsection 4j(3) (regarding "broker associations").

Audit trail study

Section 202(b) requires the Commission, not later than 2 years after its date of enactment, to submit a report to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate which contains—

(A) an assessment of the progress of each contract market in developing and implementing systems to satisfy the audit trail requirements of new subsections 5a(b)(3)–(5); and

(B) recommendations as to whether any extension of time for the implementation of such systems or any modifications of the relevant standards is appropriate.

Paragraph 202(b)(2) requires the Comptroller General of the United States to state to Congress his views with regard to the Commission's report.

Section 203. Oral orders

Section 203 requires the Commission, within 270 days of its enactment, to adopt rules requiring that a contemporaneous written record be made, as practicable, of all orders for execution on the floor or subject to the rules of each contract market placed by a

member of such contract market who is present on the floor at the time such order is placed.

Subtitle B—Broker Associations

Section 211 Trading restrictions

Section 211 creates a new paragraph 4j(3) of the Commodity Exchange Act. Beginning 270 days after its date of enactment, new subparagraph 4j(3)(A) will prohibit a floor broker from executing an order of a customer if he knows the opposite party to the transaction to be a floor broker or floor trader with whom he has a relationship as—

1. a partner in a partnership;
2. an employer or employee; or
3. such other affiliation as the Commission specifies by rule.

Exceptions

Subparagraph 4j(3)(B) provides that the prohibition in subparagraph 4j(3)(A) will not apply—

1. if the Commission adopts rules which it certifies to Congress will require procedures and standards designed to prevent violations of the Commodity Exchange Act attributable to such trading; or
2. to a contract market which has implemented rules designed to prevent such violations; except that, if the Commission determines that such rules are not adequate for this purpose, then the prohibition will take effect with regard to that contract market after a reasonable period determined by the Commission.

The Committee envisions that, to satisfy the certification requirement under the new subparagraph 4j(3)(B), the relevant Commission rules must, at a minimum, provide a uniform definition of "broker association" that can be applied industrywide, a requirement that all broker associations meeting this definition must register with the relevant contract market, and a requirement that each contract market must use its audit trail facilities to monitor trading among and between broker association members on a heightened basis in order to detect and discipline abuses related to such trading.

If the Commission finds after experience with such a regulatory structure that it is not sufficient to police such trading against abuses, the Committee expects that the Commission would so inform the Committee and initiate development of a more stringent regulatory approach to this area.

Section 212. Disclosure

Section 212 adds a new paragraph (13) to subsection 5a(a) of the Commodity Exchange Act. New paragraph 5a(13) requires each contract market to provide for disclosure to the exchange and the Commission of any trade, business, or financial cost-, profit-, or capital-sharing agreement, or other formal arrangement among or between floor brokers and traders on such contract market where the partnership agreement or arrangement is material and known to the floor trader or floor broker.

Subtitle C—Governing Structure

Section 221. Governing structure

Section 221(a) amends subsection 5a(a) of the Commodity Exchange Act by adding four new paragraphs establishing important exchange duties with respect to governing structure and conflict of interest.

Governing boards

New paragraph 5a(a)(14) requires each contract market to provide meaningful representation on the governing board of its board of trade for a diversity of interests, including—

(A) futures commission merchants;

(B) producers of, and consumers, processors, distributors, or merchandisers of principal commodities traded on the exchange;

(C) floor brokers and traders; and

(D) participants in a variety of pits or principal groups of commodities traded on the exchanges.

Such boards of trade must also provide that not less than 20 percent of such governing boards be comprised of qualified nonmembers of such contract market's board of trade and that not less than 10 percent of such members comprised, where applicable, of farmers, producers, merchants, or exporters of such principal commodities traded on the exchange. Board members qualified to be counted toward these percentage requirements may include individuals who also represent membership categories listed above. In no case, however, may any such overlapping be permitted to reduce the level of nonmember public directors to below 20 percent.

The Committee expects each exchange, in meeting its duties under new paragraph 5a(14), to take affirmative steps to assure that its board includes broad, meaningful representation of participants in all major commodity groups traded on the exchange and key sectors of the affected trading and cash industries. This would include producers, processors, distributors, merchandisers, and ultimate consumers, including foreign firms in appropriate cases. Exchanges may develop their own means of accomplishing the requirements of this paragraph, subject to review by the Commission. An exchange, for instance, may establish board membership quotas for various groups, it may rely on nominating committees to develop representative candidate slates for board elections, or it may use other such appropriate means to achieve these goals.

The Committee is mindful that futures commission merchants carrying accounts primarily for public customers should be present on contract market governing bodies so that they may represent the retail trading public where appropriate.

Meaningful numerical representation is essential to prevent the disenfranchisement of market users and to ensure that exchange boards are representative of all market participants. A board dominated by only one segment of an industry is less likely to be sensitive to the interests of all market participants or the general public. A board that is so dominated merely generates public suspicion and, because of the quasi-governmental and quasi-public nature of the commodities exchanges, erodes public confidence in

the markets. By contrast, broader representation of viewpoints on a board should improve the reality of fairness in the governance of contract markets.

Active trade representation also can help spur a more meaningful compliance program and strong floor practices supervision. Meaningful trade involvement can help prevent market problems, such as corners, trading halts, and non-competitive contract settlements. Floor and non-floor members also may have differing views regarding such matters as off-exchange trading, automation, and audit-trail enhancement. Without diverse representation, exchange boards would be less effective in addressing the need of the market as a whole.

As used in this section, the phrase "meaningful representation" means that the members chosen to represent particular interests are, in fact, fully representative of the relevant interests and are not substantially or principally representative of other interests or segments. For example, a member deemed to represent producers must be primarily engaged in the business of production, rather than in some other line of business such as functioning as a consultant or as a floor trader or broker.

New section 5a(a)(14) applies only to the governing board of each contract market's board of trade. However, contract markets should consider applying the principles of this section to their clearinghouses and other bodies in appropriate cases to engender greater public confidence in the integrity and openness of exchange decisionmaking.

Disciplinary committees

New paragraph 5a(a)(15) requires each contract market to provide on all major disciplinary committees for a diversity of membership sufficient to ensure fairness and prevent special treatment or preference in conducting disciplinary proceedings or assessing penalties. A major disciplinary committee hearing any matter must include—

1. qualified persons representing segments of the exchange membership other than that of the subject of the proceeding; and

2. where appropriate to carry out the purposes of this paragraph, qualified nonmembers of the exchange.

The Commission, in adopting rules to implement this paragraph, will define "major disciplinary committee" with respect to each contract market and will specify the conditions under which a qualified nonmember of the exchange must be included on a committee hearing a disciplinary matter. These conditions must include, at a minimum, (a) any disciplinary matter where the subject is a member of the contract market governing board or any major disciplinary committee, or (b) where the action is based on facts related to a claim of price manipulation or attempted manipulation.

Customer notification

Subparagraph 5a(a)(15)(C) provides that a contract market, on taking final disciplinary action against a member for a violation involving the execution of customer business resulting in financial harm to such customer, must promptly inform the futures commis-

sion merchant identified on its records as having cleared the transaction. The futures commission merchant is then obligated promptly to inform the person identified on its records as the owner of the account for which the transaction was executed of the disciplinary matter and the principal facts thereof.

Conflict of interest

New paragraph 5a(a)(16)(A) requires each contract market to provide for the avoidance of conflicts of interest in all deliberations by its governing board and disciplinary and oversight bodies. In implementing this provision, the contract market should strive to minimize even appearances of conflict of interest because of potential adverse effects on public confidence in exchange decision-making on sensitive matters.

The new section 5a(a)(16)(B) requires, as a minimum, that members of governing boards and disciplinary and oversight committees must abstain from certain deliberations where they or an affiliated firm are a named party in interest. The Committee expects, however, that exchanges, under their general duty under the new section 5a(a)(16)(A) to avoid conflicts of interest, will also adopt appropriate rules or procedures to prevent a particular director or committee member from participating in deliberations where he may be uniquely affected by the outcome.

New section 5a(a)(16)(C) governs contract market deliberations on whether to take actions not submitted to the Commission for prior approval. This could include not only temporary emergency rules but also major changes in levels of margin in response to extraordinary market conditions which are likely to have a substantial impact on prices and thus raise conflict-of-interest concerns.

The Committee expects that, in such emergency situations, an ongoing dialogue will occur between the Commission and the contract market considering such action. In this regard, contract markets will consult with the Commission, where practicable, in advance of taking such actions. The Committee recognizes that emergency actions by their nature must be taken expeditiously to resolve concerns over market conditions. However, the Committee views prior dialogue as a crucial and beneficial element of good decisionmaking.

Under the new clause 5a(a)(16)(C)(ii), the contract market board or committee making a potentially market-sensitive decision takes full ultimate responsibility for determining whether any member with a potential conflict of interest participates. The Board or committee or its delegate must review the market positions of each member for potential conflicts of interest, including proprietary and net customer positions held at affiliated firms. To accomplish this review, the board or committee may delegate to a single member or contract market official (including outside counsel where appropriate) the tasks of maintaining up-to-date data on the positions held by members and at their affiliated firms, reviewing this data in advance of board or committee deliberations, and making determinations about participation by particular members. The board or committee in its discretion may determine whether review of position data by the board or committee or a segment thereof is appropriate prior to making a final decision concerning a

member's participation. However, whether or not the board or committee reviews such position data, it shall be ultimately responsible for the decision concerning a member's participation.

The committee believes that disclosure to or maintenance of such data by an authorized member or staff person, and required review of such positions, will help ensure that exchange bodies avoid having interested directors participate in or vote on exchange business in inappropriate circumstances.

While clause 5a(a)(16)(C)(ii) requires that such review and consideration must cover positions in the specific futures or option contract under consideration, the Committee envisions that a wider review of positions in the relevant contract market, including contracts for all or several expiration months and/or strike prices, may be necessary to achieve the purposes of this provision.

The Committee envisions that situations may arise where a member must abstain from participating in matters before the board or committee due to conflicts of interest created by positions held by such member or at an affiliated firm. In other situations, however, abstention may be neither necessary nor appropriate. Such could be the case, for instance, where positions held by a member personally or at affiliated firms are relatively market-neutral. Similarly, the Committee expects that a member need not be disqualified simply because that member's affiliated firm holds customer positions in the applicable futures or option contract, unless those customer positions are significant and concentrated on one side of a market, such as where a small group of customers represents a significant portion of the firm's total position or business.

However, the Committee expects that, in considering abstention from participation in exchange actions due to a director's personal or affiliated firm's proprietary or customer positions, the board or committee is under an affirmative duty to exercise the utmost in good faith to avoid conflicts of interest.

In many such cases, the Committee recognizes, and contract market representatives so stated in testimony, that so-called "interested directors" can provide important and useful expertise in emergency deliberations. The Committee does believe, however, that in the limited situations where conflicts exist, it is imperative that the facts be carefully reviewed, considered, and recorded by the board and Committee in accordance with section 5a(a)(16)(ii).

For purposes of this section, the Committee intends that any member would be considered "affiliated" with any firm (1) where such member serves as an employee, officer, or director or (2) that is the parent company of any firm of which such member is an employee, officer, or director.

New subparagraph 5a(a)(16)(D) requires the board or Committee to note in its records where it has considered to direct any member to abstain from participating in any matter before the boards or committee. The Committee anticipates that this requirement will produce a record of all board or committee deliberations with respect to such matters.

Under new paragraph 5a(a)(17), each contract market must provide that no member found by the Commission, a registered futures association, or a court of competent jurisdiction to have committed any violation of the Commodity Exchange Act or any other provi-

sion of law that would reflect on such member's fitness may serve on any contract market oversight or disciplinary panel for an appropriate period as defined by Commission rule.

The Committee recognizes that small exchanges or exchanges trading a small number of commodities may encounter particular difficulty in complying with these conflict of interest provisions and anticipates that the CFTC will allow flexibility in order to address their unique needs but with careful attention to the purposes of this section.

Registered futures associations

Section 221(b) adds two new paragraphs to section 17(b) of the Commodity Exchange Act. New paragraph 17(b)(11) requires each such association to provide on its governing board for meaningful representation of a diversity of membership interests and that no less than 20 percent of the members of such board be qualified nonmembers or persons not regulated by the association.

Under paragraph 17(b)(12), each such association must provide on all major disciplinary committees for a diversity of membership sufficient to ensure fairness and to prevent special treatment or preference for any person in conducting proceedings and assessing penalties. Any major disciplinary committee hearing a matter must include—

1. qualified persons representing segments of the association membership other than that of the subject; and
2. where appropriate to carry out this purpose of this paragraph, qualified nonmembers of the association.

The Commission, in adopting rules to implement this paragraph, will define "major disciplinary committee" with respect to each such association and will specify the conditions under which a qualified nonmember of the association must be included on a committee hearing a disciplinary matter. These conditions must include, at a minimum, any disciplinary matter where the subject is a member of the association governing board or any major disciplinary committee.

Implementation rules

Subsection 221(c) directs the Commission, within 270 days of its enactment, to adopt rules as are necessary to carry out the amendments made by this section.

Subtitle D—Floor Trader Registration

A floor trader is a person who executes purchases and sales of commodity futures contracts, solely for such person's own account, on the floor of a contract market. Currently, floor traders are not required to be registered under the Commodity Exchange Act because they do not handle customer transactions. Requiring registration will make floor traders subject to the same background fitness checks as other registrants and will permit the Commission to refuse, condition, suspend, restrict or revoke floor trader registrations in appropriate cases. Further, floor traders often trade with floor brokers who execute purchases and sales for customer accounts and who are presently required to be registered with the

Commission. This title makes a floor trader who colludes with a floor broker to violate the Act or the Commission's regulations subject to the same regulatory sanctions as the floor broker.

Section 231. Unlawful to act as floor trader or broker without registration

Section 231(a) amends section 4e of the Commodity Exchange Act to make it unlawful for any person to act as a floor trader in executing purchases and sales involving any contract of sale of any commodity for future delivery, on or subject to the rules of any contract market unless the person has registered, under the Commodity Exchange Act, with the Commission as a floor trader and this registration has not expired nor been suspended or revoked.

Section 231(b) provides that the requirement that floor traders be registered will become effective 180 days after enactment of the bill.

Section 232. Registration of floor traders

Section 232 adds conforming amendments to a number of sections of the Commodity Exchange Act to include floor traders among the persons covered by these sections.

Section 232(1) amends section 4f(1) to provide that any person desiring to register as a floor trader must apply to the Commission and section 4g(1) to require floor traders to make such reports as are required by the Commission regarding the floor trader's transactions and positions; to keep books and records pertaining to these transactions and positions in the form and manner and for the period required by the Commission; and to keep these books and records open to inspection by any representative of the Commission or the United States Department of Justice. The subsection also amends section 6g(1) to include floor traders among the persons against whom a State is not authorized to bring an action in Federal court for violation of a provision of the Act.

Section 232(2) amends section 6d(8)(A) to include registered floor traders among the persons against whom an authorized State official is prohibited from proceeding in a State court for an alleged violation of any antifraud provision of the Act, or any antifraud rule, regulation, or order issued pursuant to the Act.

Section 232(3) amends section 8a(1) of the Commodity Exchange Act to authorize the Commission to register floor traders upon application in accordance with rules and regulations and in the form and manner prescribed by the Commission.

Section 232(4) amends several subsections of section 8a of the Commodity Exchange Act to include floor traders. Section 8a of the Act describes categories of statutory disqualifications which can form the basis of Commission determinations to refuse to register, to register conditionally, to suspend, place restrictions on, or revoke the registration of any person.

Subtitle E—Penalties

Section 241. Civil damages; Liability of Futures Commission merchants

In addition to liability for actual damages under existing law, sections 241(a)(2), 242(b)(2), 243(c)(2) and 244(d) would make a floor broker liable for punitive or exemplary damages up to twice the amount of actual losses if such floor broker willfully and intentionally committed a violation of the Act in connection with the execution of any order. Similarly, in the case of an order executed by an independent floor broker on behalf of a customer of a futures commission merchant, where such futures commission merchant selected the floor broker for the execution of the order, the futures commission merchant could also be held liable for an award of punitive damages made against the floor broker, if the floor broker fails to satisfy such award. Liability for punitive damages could be imposed vicariously on the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation.

These sections are intended to require a floor broker to satisfy, in the first instance, any award of actual or punitive damages made against it. The provisions would impose secondary liability on the futures commission merchant for such damages only if the customer has made a good faith effort to recover from the floor broker the amount of the damage award and the floor broker has failed to pay such amount.

These sections reflect the Committee's view that a futures commission merchant may be held secondarily liable for violations committed by an independent floor broker selected by the futures commission merchant for the execution of a customer order. Such liability could be imposed if the floor broker is found under agency law to have acted as the agent of the futures commission merchant, and the floor broker's violation is committed within the scope of the agency relationship. The fact that the floor broker is independent, therefore, does not, in the view of the Committee, preclude a finding of agency.

These provisions do not limit the liability of a futures commission merchant for the actions of an employee under section 2(a)(1)(A) of the Commodity Exchange Act.

Section 242. Customer restitution

Section 242 amends section 6(b) of the Commodity Exchange Act to permit the Commission, in assessing penalties against a person found to have violated the Act, to require restitution to customers of damages proximately caused by violations of such persons.

Section 243. Increased penalties

Section 243(a) amends sections 6(b), 6(c), and 9 of the Commodity Exchange Act to authorize the Commission, in setting penalties against persons found to have violated the Act, to assess fines of the higher of $100,000 or triple the monetary gain to such person.

Section 244. Assessment of money penalties; collection of penalties

Section 244 amends section 6(d) of the Commodity Exchange Act to eliminate the requirement that the Commission consider a wrongdoer's financial circumstances when assessing a civil money penalty under section 6(b) of the Act. The Commission is required only to consider the appropriateness of such penalty to the gravity of the violation. However, the Commission may, in its sole discretion, choose to consider such other factors as the wrongdoer's ability to pay in determining whether a penalty is appropriate in the public interest.

Section 244 further amends section 6(d) of the Act to provide that unless the person against whom a civil money penalty is assessed shows to the satisfaction of the Commission, within 15 days from the expiration of the period allowed for payment of such penalty, that either an appeal as authorized by section 6(b) has been taken or that payment of the amount of the penalty has been made, the person will be prohibited automatically from trading on all contract markets and the person's registration will be suspended automatically, if the person is registered with the Commission. Such suspension shall commence at the end of the 15 day period and continue until payment of the civil money penalty with interest thereon to the date of the payment is made.

Section 244 also provides that if on appeal the Commission prevails or the appeal is dismissed, the automatic trading prohibition and registration suspension shall be effective at the expiration of 30 days from the date of judgment on the appeal.

If the person upon whom the civil money penalty has been assessed fails to pay such penalty after the lapse of the period allowed for appeal or after the affirmance of such penalty, the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

In effect, this section provides for the automatic suspension of a person's registration and a prohibition against trading on all exchanges by such person for failure to pay a civil money penalty to the Commission when due.

Section 245. Money penalties in civil court actions

Section 245 would amend section 6c of the Act to enable the Commission to seek monetary penalties in civil court. In bringing enforcement actions, the Commission may choose between the equitable relief available in Federal court actions brought under section 6c of the Act (i.e., injunctions, appointments of receivers, or orders of restitution or disgorgement), and the administrative remedies provided for in section 6(b). However, the Commission cannot obtain both an injunction and a civil penalty in a single enforcement action.

In some instances, individuals or firms may be engaged in ongoing wrongdoing that should be halted quickly by preliminary or permanent injunction, and also is appropriately punished and deterred by a civil monetary penalty. Yet, in choosing to proceed with an injunctive action under current law, the Commission must either forgo a civil monetary penalty, or bring a separate adminis-

trative action contemporaneously or subsequently in order to impose such a penalty. This procedure consumes additional Commission resources and may lead to delays in obtaining all the remedial relief that the Commission believes is warranted since two cases rather than one must be brought and pursued to final judgments.

Authorizing the Commission to seek civil penalties in Federal court actions brought pursuant to section 6c would permit a wider array of sanctions to be used in a single action. This could both eliminate delays and resource demands associated with duplicative enforcement actions, and allow the Commission and Federal courts to use a more varied and more effective package of sanctions in a single forum. Recent securities law amendments have given the SEC similar authority to obtain civil penalties in Federal injunctive actions.

Moreover, the ability of the Commission to seek imposition of civil monetary penalties in addition to equitable remedies will increase the financial risks of wrongdoing. While equitable remedies are designed to halt violations and take away the profits of illegal conduct, they may leave the violator no worse off than if he or she had never broken the law. Exposure to civil monetary penalties in addition to these remedies places the violator at risk of significant pecuniary loss. The mix of remedies and penalties most effective for deterrence would be evaluated on a case-by-case basis. The Committee understands that the Commission intends to seek civil penalty assessments that will not divert assets that would be more appropriately used for disgorgement, or in instances where disgorgement would not be an effective remedy.

Section 246. False information to self-regulatory organization

Section 246 adds a new subsection 9(g) to the Commodity Exchange Act under which it will be a felony for any person knowingly and willing to falsify, conceal, or cover up a material fact, or make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document which it knows to contain any false, fictitious, or fraudulent statement or entry to a contract market, board of trade, or futures association designated or registered under the Act acting in furtherance of its official duties under the Act. This provision extends to such self-regulatory organizations the current statutory bar against making such false or fraudulent representations to a Federal agency under 18 U.S.C. 1001. The Committee intends that this prohibition will apply to any false or fraudulent entry made by a floor trader or floor broker with respect to a contract market's audit trail system.

Section 247. Willful violations; false and misleading statements

The new section 9(h) extends standards of criminal conduct applicable under the Securities Exchange Act since the 1930's (15 U.S.C. 78ff) to the Commodity Exchange Act. The provision supplements existing criminal provisions under the Commodity Exchange Act to assure that criminal penalties are available for all willful and knowing violations of the Act and Commission regulations made unlawful under the Act. The new section is not intended to affect any of the existing provisions of section 9 of the Act nor to alter

the standards of liability applicable to violations of the Act under existing law. Where existing provisions of section 9 provide penalties lower than those under the new section 9(h), a court could consider these in appropriate cases as lesser included offenses.

Because conviction under the new section 9(h) requires proof that a person has acted "knowingly," it is not envisioned, for instance, that a board or committee member of a contract market be subject to criminal liability for a violation of new section 5a(16) regarding conflict of interest unless the person actually knows, through advice of counsel or otherwise, that his action would be a violation of that section, and still proceeds to take such action "willfully."

Recognizing that penalties under the new section 9(h) are severe, the Committee does not envision that it be used for trivial or minor offenses better addressed under other civil or criminal Commodity Exchange Act authorities.

Section 248. Complaints against registered persons; class action suits

Section 248 authorizes the bringing of actions under the Commission's reparations procedure by one or more persons on behalf of themselves and others similarly situated (class actions) if the Commission has issued final rules permitting such actions. The Commission is directed, not later than 270 days after the enactment of this provision, to propose and publish such rules for public comment. In developing these rules, the Commission must consider the potential impact of such actions on resources available to the reparations system and the relative merits of bringing such actions in Federal court.

Section 249. Penalties study and guidelines

Section 249 directs the Commission, not later than 2 years after enactment, to report to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate on the results of a study it will conduct on penalties imposed by the Commission and contract markets against persons found to have violated the Act and the contract markets' respective rules. The report shall——

1. include an analysis of whether systematic differences exist among penalties imposed by various contract markets for similar offenses and, if so, the reasons for such differences;

2. propose industrywide guidelines or rules to make penalty levels among exchanges consistent, including, if appropriate, minimum penalties or penalty ranges for various offenses; and

3. propose guidelines or rules to make Commission penalty levels consistent, including, if appropriate, minimum penalties or penalty ranges for various offenses. In view of the amendments to the Commission's penalty powers under sections 243 and 244, the Commission is encouraged, if practicable, to develop these guidelines or rules on an expeditious basis, perhaps in advance of other portions of the 2-year study mandated under this section.

Subtitle F—Assistance to Foreign Futures Authorities

This subtitle permits the Commission to assist foreign futures authorities by conducting investigations on their behalf without regard to whether the facts stated in the request constitute a violation of United States law. The ability to assist foreign futures authorities will help the Commission to obtain reciprocal investigative assistance from those authorities. Such assistance will enhance effective enforcement of the Commodity Exchange Act in investigations requiring information from foreign sources.

Section 251. Subpoena authority

Section 251 amends section 6(b) of the Act to provide that, for purposes of any action taken under new section 12(f) of the Act which authorizes investigative assistance to foreign futures authorities, any member of the Commission or any administrative law judge or other officer designated by the Commission may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry.

Section 252. Disclosure by the Commission of information received from foreign futures authorities

Section 252 amends section 8(b) of the Act to provide that nothing in section 8(b) applies to the disclosure of data or information obtained by the Commission from a foreign futures authority.

Section 253. Disclosure by the Commission of information to foreign futures authorities

Section 253 makes conforming amendments to section 8(e) of the Act to provide that the Commission may, upon request, furnish to a foreign futures authority any information in the possession of the Commission obtained in connection with the administration of the Act. Section 253 would also prohibit the Commission from furnishing any information to a foreign futures authority unless the Commission is satisfied that the information will not be disclosed by such foreign futures authority except in connection with certain adjudicatory actions or proceedings specified in section 8(e) of the Act.

Section 254. Cooperation with foreign futures authorities

Section 254 amends section 12(a) of the Act to provide that the Commission may cooperate with any foreign futures authority, any department or agency of a foreign government or political subdivision thereof.

Section 255. Investigative assistance to foreign futures authorities

Section 255 adds a new section 12(f) to the Act that authorizes the Commission, on request from a foreign futures authority, in the Commission's discretion, to provide assistance in accordance with section 12(f) of the Act if the requesting authority states that it is conducting an investigation that it considers necessary to determine whether any person has violated, is violating, or is about to

violate any laws, rules or regulations relating to a futures or options matter that the requesting authority administers or enforces. The Commission may conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance. Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States. In deciding whether to provide assistance under section 12(f), the Commission must consider (1) whether the requesting authority has agreed to provide reciprocal assistance to the Commission in futures and options matter; and (2) whether compliance with the request would prejudice the public interest of the United States.

To protect against the possibility that the Commission might assist in an unfocused and unbound foreign "fishing expedition," it is contemplated that the foreign authority seeking the Commission's assistance will submit a request stating the facts which constitute a potential violation of its laws. The Committee anticipates that the Commission will carefully examine this request prior to determining whether to issue an order authorizing issuance of subpoenas.

The Committee intends that, in the conduct of investigations under this section, persons requested to supply information or testimony would be entitled to the same rights and privileges currently afforded to persons in other Commission investigations, and that such persons would also be entitled to assert privileges available in the foreign countries seeking evidence as to those matters which are not privileged under United States law.

Section 256. Payments from foreign futures authorities

Section 256 adds a new section 12(g) to the Act to provide that notwithstanding any provision of law, the Commission may accept payment and reimbursement, in cash or in kind, from a foreign futures authority, or made on behalf of such authority, for necessary expenses incurred by the Commission, its members, and employees in carrying out any investigation pursuant to this section or in providing any other assistance to a foreign futures authority. Any payment or reimbursement accepted will be considered a reimbursement to the appropriated funds of the Commission.

Subtitle G—General Provisions

Section 261. Definitions

Existing section 2(a)(1)(A) of the Act is extremely confusing in the organization of its definitional, jurisdictional and other provisions. New section 261 will reorganize section 2(a)(1)(A) in order to eliminate this confusion and to facilitate reference to its provisions. No substantive changes in law are intended by this reorganization. However, two new definitions as added, as follows:

"Floor trader" is defined to mean any person who, in or surrounding any "pit," "ring," "post," or other place provided by a contract market for the meeting of persons similarly engaged, purchases or sells solely for such person's own account any commodity for future delivery on or subject to the rules of any contract market.

"Foreign futures authority" is defined to mean any foreign government, or any department, agency, governmental body, or regulatory organization empowered by a foreign government to administer or enforce laws, rules, or regulations relating to futures or options matters, or to any department or agency of a political subdivision of a foreign government empowered to administer or enforce laws, rules, or regulations relating to futures or options matters.

As defined in the bill, the term "foreign futures authority" would include any foreign governmental department or agency administering or enforcing laws relating to futures and options, at both the national and the political subdivision level; as well as self-regulatory organizations, and bodies such as the United Kingdom Securities and Investment Board, which are empowered to enforce such laws as they relate to futures and options; and foreign criminal authorities empowered to prosecute violations of futures or options laws, or other types of criminal laws as they relate to activity in futures and options.

Section 262. Risk assessment for holding company systems

New section 4f(3) would enable the Commission to adopt rules requiring futures commission merchants to provide reports regarding the activities of affiliated persons that are reasonably likely to materially affect the financial or operational condition of such entities. The section also would enable the Commission to adopt rules requiring a futures commission merchant to obtain information and make and keep records concerning the futures commission merchant's policies, procedures or systems for monitoring and controlling financial and operational risks to it resulting from the activities of any of its affiliated persons. Summary reports of such information could generally be required no more frequently than quarterly, although further reports may be required based upon adverse market conditions, or based on questions raised by the routine reports filed by the futures commission merchant or other available information.

An "affiliated person" would be defined as any person directly or indirectly controlling, controlled by or under common control with a futures commission merchant, as the Commission determines by rule or regulation, will effectuate the purposes of this section. The definition of "affiliated person" is similar to the definition of "associated person" found in section 3(a)(18) of the Securities Exchange Act of 1934, which is used in the Market Reform Act of 1990, the recently enacted amendments to the Exchange Act. The section would not require information to be provided concerning the activities of any natural person.

A registered futures commission merchant would be deemed to be in compliance with any recordkeeping or reporting requirement adopted under this amendment with respect to affiliated persons that are banks (including foreign banks), savings and loan associations, bank holding companies and savings and loan holding companies (and their subsidiaries which are not registered securities brokers or dealers), if such futures commission merchant provides copies of reports filed by such affiliated persons with their banking regulatory agency. The Commission could, however, adopt rules requiring futures commission merchants to obtain, maintain or

report supplemental information if the Commission explicitly finds that such supplemental information is necessary to assess potential risks to futures commission merchants. The Commission must also first request the appropriate banking regulatory agency to expand its reporting requirements to include such supplemental information.

The section authorizes the Commission to provide exemptions from the reporting requirements either conditionally or upon specified terms and conditions or for stated periods for entities such as an insurance company, a government securities broker or dealer or a municipal securities dealer. Among other things, this provision would allow the Commission to exclude from the reporting requirement any information regarding diversified holding companies and international financial organizations that do not devote a significant portion of their consolidated assets to activities in the U.S. futures and commodity options markets. The section also notes that in granting exemptions, the Commission may consider the primary business of any person and the nature and extent of domestic or foreign regulation of the person's activities. Thus, for example, the Commission may determine not to require information concerning holding companies or affiliates of futures commission merchants that are primarily engaged in nonfinancial activities such as merchandising, manufacturing, construction (other than equity investment or financing), travel services, real estate brokerage, consumer lending, publishing or nonfutures-related information processing.

The Committee intends that the Commission make use of its exemptive authority under this provision to avoid imposing unnecessary paperwork burdens upon securities brokers or dealers regulated by the SEC. If the Commission exercises its authority under section (3)(A) to adopt routine reporting requirements, the Commission, as in the case of its other financial reporting requirements, should take into account information collected by other financial regulatory agencies. With respect to firms dually registered as futures commission merchants and securities brokers or dealers, it is intended that the Commission exercise its exemptive authority to permit such firms to comply with routine reporting requirements adopted pursuant to section (3)(A) by filing with the Commission copies of filings submitted to the SEC under section 17(h) of the Securities Exchange Act of 1934. With respect to any futures commission merchant filing reports provided to the SEC under section 17(h) of the Securities Exchange Act of 1934 pursuant to such exemption, the Commission may by rule adopted pursuant to paragraph (3)(A) require such futures commission merchant to obtain, maintain, or report supplemental information if the Commission makes an explicit finding that such supplemental information is necessary to inform the Commission regarding potential risks to such futures commission merchant.

Similarly, with respect to futures commission merchants that have as affiliated persons registered securities brokers or dealers, it is expected that to the extent possible the Commission will permit futures commission merchants to obtain, maintain and report information through reports required by the SEC, without reformatting by the futures commission merchant. Furthermore, in exercising its authority to call for futures commission merchants to pro-

vide additional information about the exposure of their affiliates that are brokers or dealers regulated by the SEC, the Commission should consult with the SEC, if feasible, to determine if the SEC can supply the necessary information more expeditiously.

This section expressly requires the Commission to notify the Federal banking agency of any concerns of the Commission regarding significant financial or operational risks resulting from the activities of any futures commission merchant to any affiliated person thereof which is subject to examination by or reporting requirements of the Federal banking agency.

This provision requires the Commission to treat any information reported, or supplied to the Commission by any domestic or foreign regulatory agency, under this section of the Act as information subject to the confidentiality provisions of section 8 of this Act. The Commission is therefore generally prevented from disclosing such information to third parties.

The provision includes an express statement that nothing contained therein shall be construed to supersede or limit in any way the authority or powers of the Commission pursuant to any other provision of the Commodity Exchange Act or regulations promulgated thereunder.

Section 263. Ethics training for registrants

Subsection (a) of section 263 will amend section 4p of the Commodity Exchange Act (7 U.S.C. 6p) by redesignating the existing section 4p as section 4p(a) and by adding a new section 4p(b) that will require the Commission to issue regulations to require new registrants, within 6 months after receiving such registration to attend a training session, and all other registrants to attend periodic training sessions, to ensure that registrants understand their responsibilities to the public under the Commodity Exchange Act, including responsibilities to observe just and equitable principles of trade, any rule or regulation of the Commission, any rule of any appropriate contract market, registered futures association, or other self-regulatory organization, or any other applicable Federal or State law, rule or regulation.

Subsection (b) of section 263 will require the Commission to issue the regulations required by the new section 4p(b) of the Commodity Exchange Act no later than 180 days after its date of enactment.

Section 264. Undercover operations and enforcement

Section 264 redesignates the first two sentences of section 8(a) of the Commodity Exchange Act as paragraphs (1) and (2) and adds a new paragraph (3) empowering the Commission, by order, to authorize specified employees to conduct undercover investigations where the Commission has reason to believe that violations of the Act have occurred, may be occurring, or may be about to occur so that the Commission can ascertain whether proceedings under the Act with respect to those violations are appropriate.

The Commission may not adopt an order authorizing an investigation under this paragraph unless it has first made a request to the Attorney General to conduct the proposed investigation and the Attorney General has declined to do so in a reasonable period as determined by the Commission. The Commission must notify the

Attorney General before initiating an investigation under this paragraph and other Federal and State law enforcement officials as appropriate. In conducting the investigation, the Commission may coordinate with and seek assistance of other Federal and State law enforcement authorities, contract markets, registrants, and other parties as it considers appropriate.

During the conduct of an undercover investigation, the employees conducting it must report to the Chairman of the Commission on its progress not less than once every 90 days. A Commission employee who participates in a violation of the Act in the course and as a necessary element of an investigation under this paragraph will not be liable in any action or proceeding arising from such violation.

The Commission, by rule, must adopt procedures governing the conduct of such investigations similar to guidelines adopted by the Attorney General for the conduct of undercover investigations.

Section 265. Access by GAO to information maintained by self-regulatory organizations

Section 265 provides that the Comptroller General and any duly authorized representative, for the purpose of conducting reviews and audits of the Commission and making reports thereon, shall, under the terms and conditions applicable to the Commission, have access to and the right to examine all records and other recorded information in any form, and to examine any property that is within the possession and control of any contract market, clearinghouse, or registered futures association within the jurisdiction of the Commission. This provision would not apply to records that relate to open position data unless pursuant to a request of the Committee on Agriculture of the House of Representatives or the Committee on Agriculture, Nutrition, and Forestry of the Senate. The Comptroller General is required to maintain the same level of confidentiality for such information as the Commission; GAO officers and employees are made subject to the same penalties for unauthorized disclosure or use as officers and employees of the Commission.

The Comptroller General is also barred from including in reports data and information that would separately disclose the business transactions or market positions of any person or trade secrets and names of customers except on request of any Committee of either House of Congress acting within its scope of jurisdiction.

Section 266. Enhancement of registration requirements

Sections 266(a)–(d) make various amendments to section 8a(2) of the Commodity Exchange Act (7 U.S.C. 12a). Section 8a(2) of the Act currently outlines the conditions under which the Commission is authorized to refuse to register, to register conditionally, or to suspend or place restrictions upon the registration of, any person and (with such a hearing as may be appropriate) to revoke the registration of any person.

Section 266(a) amends section 8a(2)(C)(ii) of the Commodity Exchange Act to authorize the Commission to refuse, suspend, restrict or revoke a person's registration pursuant to section 8a(2), in addition to the bases in current law, if such person is temporarily or

permanently enjoined from engaging in or continuing any activity that the Commission determines involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling.

Section 266(b) amends section 8a(2)(D)(iv) of the Commodity Exchange Act (7 U.S.C. 12a(2)(D)(iv)) to authorize the Commission to refuse, suspend, restrict or revoke a person's registration pursuant to section 8a(2), in addition to the bases in current law, if such person has been convicted within 10 years preceding the filing of the application for registration or at any time thereafter of any felony that involves the violation of section 1001 (false statements), 1503 (obstruction of justice), 1623 (perjury), 1961, 1962 and 1963 (racketeering), or 2314 (interstate transportation of stolen property) of title 18 of the United States Code or section 7201 or 7206 (tax evasion) of the Internal Revenue Code of 1986.

Section 266(c) amends section 8a(2)(E) of the Commodity Exchange Act (7 U.S.C. 12a(2)(E)) to provide that the Commission may act under section 8a(2) against a person who has been found to have violated the Commodity Exchange Act or certain other provisions of law in a proceeding brought by the appropriate governmental body. Currently section 8a(2)(E) requires in part that such finding be made by a court of competent jurisdiction or the appropriate governmental body. Subsection (c) of section 804 also amends section 8a(2)(E)(i) to add to the list of grounds on which the Commission may act against a person under section 8a(2) the violation of chapter 96 of title 18 of the United States Code (popularly known as the Racketeer Influenced Corrupt Organizations or "RICO" Act).

Section 266(d) amends section 8a(2)(G) of the Commodity Exchange Act (7 U.S.C. 12a(2)(G)) to expand the grounds under which the Commission may act against a person under section 8a(2) to include the willful making of any materially false statement or omission to state any material fact in the person's application or any update to the application regarding any disqualification from registration under section 8a(2) or 8a(3) of the Act.

Sections 266(e)–(i) make various amendments to section 8a(3) of the Commodity Exchange Act (7 U.S.C. 12a(3)). Section 8a(3) of the Act currently outlines the conditions under which the Commission is authorized to refuse to register or to register conditionally any person conditionally any person who is found, after opportunity for hearing, to have violated certain laws, regulations or orders, or to have committed other acts specified in section 8a(3).

Section 266(e) amends section 8a(3)(D) of the Commodity Exchange Act (7 U.S.C. 12a(3)(D)). Currently section 8a(3)(D) authorizes the Commission to disqualify from registration persons convicted, within 10 years prior to the filing of a registration application, of felonies other than the types specified in section 8a(2)(D), as well as persons convicted of 8a(2)(D) type felonies more than 10 years preceding the filing of an application. Section 266(e) of the bill includes instances when a person pleads guilty to, as well as actual convictions of, the named felonies as grounds for refusal to register or to register conditionally, and eliminate the 10 year limit on felony convictions other than the type specified in section 8a(2).

Section 266(f) amends section 8a(3)(E) of the Commodity Exchange Act (7 U.S.C. 12a(3)(E)). Section 8a(3)(E) currently authorizes the Commission to refuse to register or to register conditionally persons convicted, within 10 years prior to the filing of a registration application, of certain misdemeanors enumerated in section 8a(3)(E). Section 266(f) of the bill eliminates the 10 year time limit and include instances when a person pleads guilty to, as well as actual convictions of, the named misdemeanors. Section 266(f) also adds to the list of misdemeanors under section 8a(3)(E) those involving violations of section 7203, 7204, 7205, or 7207 (tax evasion) of the Internal Revenue Code of 1986.

Section 266(g) amends section 8a(3)(G) of the Commodity Exchange Act (7 U.S.C. 12a(3)(G)). Section 8a(3)(G) currently authorizes the Commission to refuse to register or to register conditionally a person who willfully makes any materially false or misleading statement or who willfully omits to state any material fact in such person's application for registration, in any report required to be filed with the Commission, or in any proceeding before the Commission. Section 266(g) of the bill makes clear that the Commission is similarly authorized with respect to any person who makes such false and misleading statements or omissions in (1) updates to such a person's registration application, or (2) the course of a registration disqualification proceeding.

Section 266(h) amends section 8a(3)(H) of the Commodity Exchange Act (7 U.S.C. 12a(3)(H)). Section 8a(3)(H) authorizes the Commission to disqualify from registration a person who pleads nolo contendere to criminal charges of felonious conduct, or who has been convicted in a state court or in a foreign court of conduct which would constitute a felony under Federal law if the offense had been committed under Federal jurisdiction. Section 266(h) of the bill amends section 8a(3)(H) to include convictions in United States military courts among those convictions potentially resulting in a refusal to register, or conditional registration of, a person.

Section 266(i) amends section 8a(3)(J) of the Commodity Exchange Act (7 U.S.C. 12a(3)(J)). Section 8a(3)(J) authorizes the Commission to refuse to register or to register conditionally a person who is subject to an outstanding order denying, suspending, or expelling such person from membership in a contract market, a registered futures association, or any other self-regulatory organization, or barring or suspending such person from being associated with any member or members of such contract market, registered futures association or self-regulatory organization. Section 266(i) of the bill amends section 8a(3)(J) to include denials, bars, suspensions and expulsions from foreign regulatory organizations which the Commission has recognized as having a comparable regulatory program.

Section 267. Suspension of registrants charged with felonies

Section 267 amends section 8a of the Commodity Exchange Act to explicitly authorize the Commission to suspend or modify the registration of registrants charged in any information, indictment or complaint with a felony involving the violation of the Act or any other statute that reflects on the honesty or fitness of the registrant to act as a fiduciary. These include, among other statutes, the

statutes described in subparagraphs (D) and (E) of section 8a of the Act.

In modifying a person's registration under this section, the Commission could require such person to trade solely for their own account and not execute orders for customers. Such a suspension or modification would be issued by the Commission upon a determination that, as a result of the indictment, the continued registration of the registrant may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission.

The suspension or modification would continue in effect until the information, indictment or complaint is disposed of or until the suspension is terminated by the Commission.

As a result of the person's indictment, the Commission could employ its statutory disqualification procedures, for example, to issue a notice of suspension or modification upon a determiniation that, as a result of the indictment, the continued or unmodified registration of the registrant may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission. This section would permit the Commission in accordance with its existing or revised procedures to modify a person's registration to prevent that person from handling customer orders during the pendency of an indictment.

No suspension or modification of an indicted registrant's registration would be effective until after the registrant had an opportunity to request a hearing. At a hearing requested by a registrant, the Commission would have the burden of showing that the continued or unmodified registration of the registrant may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission. The actual showing required to meet this burden will vary depending on the offense charged in the indictment. An indictment for an alleged offense directly related to or allegedly occurring on a market regulated by the Commission will generally require less of a showing of a threat to the public interest or public confidence in that market than an indictment which, for example, charges an offense that reflects on the honesty of the registrant but is unrelated to any market regulated by the Commission.

The Committee anticipates that the indicted registrant may rebut the Commission determination to suspend or modify his or her registration only on limited grounds. The registrant may show that continued registration does not, or is not likely to impair the public interest of public confidence in any market regulated by the Commission. Further, the registrant may show that the offense for which he or she has been indicted is not an offense for which suspension or modification could be imposed under this provision. The Commission may determine, in adopting rules to implement this section, whether the consideration of evidence of rehabilitation or mitigation is proper or necessary. The registrant's showing may be made by affidavit, at the discretion of the Commission, in appropriate circumstances.

If the administrative law judge determines that the Commission has carried its burden and that the registrant has failed to rebut the Commission's showing, the administrative law judge must

either suspend or modify the registrant's registration, whichever is requested in the Commission's notice. The Commission may stay the suspension or modification of registration pending a Commission decision on an administrative appeal filed by registrant.

It is anticipated that the rules adopted by the Commission under this section will contain strict deadlines for the commencement of the hearing and for the issuance of a decision after the hearing and for a decision on any appeal to the Commission permitted by the rules.

If the indicted registrant is convicted, the Commission may begin a proceeding to revoke the registration of the person under subparagraph (2) or (4) of section 8a. Commencement of such a proceeding would not lift the suspension or modification. A finding of not guilty would lift the suspension or modification but would not prevent the Commission from initiating an administrative proceeding to revoke the registrant's registration.

This section of the bill is similar to 12 U.S.C. section 1818(g) which authorizes the Federal Deposit Insurance Corporation to suspend from office an indicted official of a Federally insured bank if the official's continued service poses a threat to the interests of the bank's depositors or threatens to impair public confidence in the bank. The constitutionality of section 1818(g) of title 12 was upheld by the Supreme Court in *FDIC* v. *Mallen*, 108 S. Ct. 1780 (1988).

Section 268. Prohibition against insider trading

Section 268 creates a new subsection 9(i) of the Commodity Exchange Act under which it will be a felony for a contract market employee, member of the governing board, or member of any committee of a board of trade, contract market, or registered futures association, in violation of Commission regulations, willfully and knowingly to trade for their own account in futures or option contracts on the basis of any material nonpublic information obtained through special access related to the performance of such duties. It will also be a felony to disclose such information for any purpose inconsistent with the performance of their official duties. Violation of this provision will be punishable by a fine of not more than $500,000, plus the amount of profits realized from such trading or disclosure, or imprisonment for not more than 5 years, or both, together with costs of prosecution.

Section 269. International competitiveness of electronic trading systems

Section 269 directs the Commission, consistent with its responsibilities under section 18 of the Commodity Exchange Act, to facilitate the development and operation of computerized trading as an adjunct to the open outcry auction system. The provision also directs the Commission to cooperate with the Office of the United States Trade Representative, the Treasury Department, and Departments of Commerce and of State in order to remove any trade barriers that may be imposed by a foreign nation on the international use of electronic trading.

Section 270. Interests of producers of agricultural commodities

Section 270 directs the Commission, in discharging its duties and functions under the Act, to take into consideration and endeavor to serve the interests of producers of agricultural commodities, consistent with its responsibility to promote the public interests served by and the integrity of futures and option markets. The Commission must include in its annual reports information describing specific actions it has taken to discharge its responsibilities under this provision.

In adopting this provision, the Committee recognizes that the Commission must pursue its regulatory duties in a market-neutral manner, mindful of the interests of all market users and affected groups, including consumers, processors, distributors, and merchandisers as well as producers. The Committee recognizes that it is not the function of the Commission to manage or regulate prices of agricultural commodities.

Section 271. Appeals by registered futures associations

Section 271 amends section 17(i)(4) of the Commodity Exchange Act to remove the exception in that provision which now bars a registered futures association from appealing certain decisions of the Commission.

Section 272. Telemarketing fraud

Section 272 amends section 17(p) of the Commodity Exchange Act to add a new paragraph (4) to provide that registered futures associations must adopt, subject to Commission approval and in accordance with standards consistent with the policies of the Act, supervisory guidelines applicable to those association members determined to require such guidelines concerning the solicitation of new futures or options accounts by telephone. These guidelines could include a requirement that the member of the association may not enter an order for the account of a customer with no previous futures or options experience for a period of 3 days following opening of the account and receipt of a signed acknowledgment of receipt of a risk disclosure statement by the customer. These rules must be submitted for approval no later than 180 days after the enactment of this section. Section 272 also makes certain conforming amendments to section 17(p).

One of the policies that the Commission must consider in approving the guidelines required by this section is that expressed in section 15 of the Act. That section encourages the least anticompetitive regulatory action.

This provision is intended by the Committee to provide customers with further protection against abusive sales practices relating to the telephone solicitation of new futures and options customers. The amendment would require each registered futures association to establish specific standards, which must be approved by the Commission, to pinpoint those types of firms which need to establish enhanced telemarketing supervisory procedures for the solicitation of new futures or options customers. For example, firms which have previously been the subject of enforcement actions involving telemarketing or firms whose sales force or management

structure includes a large percentage of persons who previously worked for and received training from such firms could be required to adopt enhanced supervisory procedures. Enhanced procedures could include, for example, the tape recording or outside monitoring of all telephone sales solicitations. These supervisory requirements could be enforced through the registered futures association's existing disciplinary procedures.

Section 273. Venue; service of process

Section 273 amends section 22(c) of the Commodity Exchange Act to authorize nationwide service of process in, and to add particularized venue provisions for, private actions brought under section 22(a) of the Act. As amended, section 22(c) provides that actions may be brought in any district where the defendant is found, is an inhabitant, or transacts business, or in the district where any act or transaction constituting the violation occurred. Process in such an action may be served in any district where the defendant is an inhabitant or wherever the defendant may be found.

This amendment thus empowers United States district courts sitting anywhere in the country to issue process against a particular defendant, without regard to whether the plaintiff can establish minimum contacts between the defendant and the State in which the United States district court sits. Further, the special venue provisions for section 22(a) actions grant a plaintiff greater choice in selecting the forum in which to bring an action.

Section 274. Study of delivery points for agricultural commodity contracts

This section requires the Comptroller General of the United States, by not later than 1 year after its date of enactment, to conduct and report to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate on the results of a study of the provision for and functioning of delivery points with respect to futures contracts on agricultural commodities to determines whether the objectives of section 5a(10) of the Commodity Exchange Act are being achieved. The study will also examine—

1. whether the objectives of the Act relative to such delivery points need to be revised;
2. whether the availability and adequacy of storage facilities for agricultural commodities at such delivery points affect price;
3. whether the number, accessibility, and volume of storage facilities at such delivery points contribute to consistency and reasonableness in price discovery in the contract markets;
4. whether a system of cash delivery for such futures contracts would be feasible and would further the public interest in hedging and price basing for agricultural commodities;
5. whether special concerns about the adequacy of delivery points are raised by participation in such markets of international corporations whose commercial needs for physical commodities are global; and
6. other relevant issues as determined by the Comptroller General.

TITLE III—INTERMARKET COORDINATION

Section 301. Margin on stock index futures

Section 301 provides that, notwithstanding any other provision of the Commodity Exchange Act, any contract market in a stock-index futures contract (or option thereon) must file with the Board of Governors of the Federal Reserve System any rule establishing or changing the levels of margin (initial and maintenance only) for such stock-index futures contract (or option thereon). The Board may at any time request any contract market to set margin for any stock index futures contract (or option thereon) at such levels as the Board in its judgment determines are appropriate to preserve the financial integrity of the contract market or its clearing system or to prevent systemic risk. If the contract market fails to do so within the time specified by the Board in its request, the Board may direct the contract market to alter or supplement the rules of the contract market as specified in such request. The Board is authorized, subject to such conditions as it may determine, to delegate any or all of its authority under this subsection only to the Commission. Nothing in this subsection supersedes or limits the authority granted to the Commission in section 8a(9) of the Act to direct a contract market, upon finding an emergency to exist, to raise temporary emergency margin levels on any futures contract or option on such contract covered by this subsection.

Any action taken by the Board under section 301 directing a contract market to alter or supplement a rule is subject to review only in the Court of Appeals where the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit. This review is to be based upon an examination of all information before the Board at the time the determination was made. The court reviewing the Board's action may not enter a stay or order of mandamus unless it has determined, after notice and a hearing before a panel of the court, that the agency action complained of was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Section 302. Exemptive authority

Section 302 gives the Commission the power to exempt transactions and persons from the exchange-trading and other requirements in the Act applicable to futures contracts (other than the jurisdictional provisions of the 1982 CFTC-SEC Accord codified in sections 2(a)(1)(B) and 4c(f)). The Commission may specify by rule, regulation or order the conditions under which persons could apply to offer or trade off-exchange futures contracts or render advice regarding such futures contracts. Under this authority, the Commission could specify, for example, whether and to what extent the Act's antifraud, registration, segregation or other provisions should be applied to a particular class of transactions and the persons engaged in the transactions. In order to grant an exemption, the Commission must find that it is consistent with the public interest.

Persons seeking an exemption from the exchange trading requirement of section 4(a) of the Act also must demonstrate to the Commission's satisfaction that the exemption would be consistent

with the public interest and with the purposes of the Act and that the agreement, contract or transaction—

(i) will be entered into solely between institutional participants;

(ii) will be entered into in connection with a line of business or for hedging or risk management purposes; and

(iii) will not have a material adverse affect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under this Act.

"Institutional participants" are defined as specified persons (such as banks, insurance companies and employee pension plans plus others) who the Commission determines have the financial and other qualifications adequate to fulfill the terms and conditions of the agreement, contract or transaction.

The Commission may revoke any exemption previously granted if the minimum conditions for the exemption or those imposed by the Commission are no longer being met.

This new exemptive authority can and should be used to provide greater regulatory flexibility with respect to transactions in existing markets, as well as for new transactions or markets. For example, one court has found transactions in the Brent crude oil market to be futures contracts. See *Transnor,* supra. In response, the CFTC has issued a statutory interpretation to the effect that certain transactions in that market qualify as sales of cash commodities for deferred shipment or delivery, that is, forward contracts, and, as such, are not subject to regulation under the Act. Concern has been expressed, however, by a number of participants in the Brent market and other markets that the CFTC's interpretation may not have removed all doubt concerning the legal status of these transactions. This problem is exacerbated by the fact that many of these markets are international in scope and that foreign parties are already engaging in all of these transactions, free of the restraints imposed by the Act. U.S. participants in these markets, thus, may be placed at a competitive disadvantage.

The exemptive authority contained in new section 4(c) of the Act can be used to deal with issues of this nature. The Committee encourages the CFTC expeditiously to review this situation and these contracts to determine whether exemptive or others action should be taken with respect to such markets.

Swaps and certain bank deposits

Exclusion.—New section 4(d)(1) expressly excludes certain swaps from regulation under the Act if they meet both of two tests:

(1) the parties to the swaps are hedging or managing a business-related price risk; and

(2) the parties reasonably expect to perform their payment obligations at the times specified in the swap.

Exemption.—New section 4(d)(2) directs the Commision to grant an exemption for swap agreements, to the extent any such agreements may be considered to be subject to regulation under the Act, if the Commission determines that (a) an exemption would not be contrary to the public interest; (b) each party to the swap is an "institutional participant" (as defined); (c) each party's creditworthiness would be a material element in the negotiation of the swap;

and (d) the swap agreement is not designed to and would not result in a trading market in the swap agreements.

New section 4(d)(3) directs the Commission to grant an exemption from the Act for certain commodity-indexed and other commodity-valued deposits and transaction accounts if the deposit or account is offered by an institution subject to the authority of a Federal bank regulator or a State regulator with a comparable regulatory system which oversees the financial integrity and customer protection of the deposits and the exemption would not be contrary to the public interest.

Bank regulators now require that institutions offering such indexed deposits hedge their resulting risk, generally through the bank's participation in the futures markets. The Committee anticipates that bank regulators will continue to assure that the risks of commodity-indexed deposits are appropriately managed.

Section 303. Hybrid commodity instruments

Section 303 amends section 4c of the Act by adding a new subsection (h) establishing a functional approach to resolving jurisdictional issues with respect to hybrid commodity instruments. New subsection 4c(h) provides that nothing in the Commodity Exchange Act will be deemed to govern or in any way be applicable to any transaction meeting the following requirements:

> (1) to the extent that the instrument has elements of a commodity option, the instrument derives less than 50 percent of its value at the date of issuance from the value of the commodity option, and
>
> (2) to the extent that an instrument has elements of a contract of sale of a commodity for future delivery, at the date of issuance it is expected that less than 50 percent of the change in the value of the instrument or its performance will be due to movement in the price of the commodity or commodities specified in the instrument or in the terms and conditions of the transaction pursuant to which the instrument was issued.

Paragraph (B) of the new subsection confirms that transactions in or involving a regulated commodity which are not excluded under this subsection and are not otherwise excluded from the Act will continue to be governed by the Commission under sections 2(a)(1), 4, 4c or 19. These other existing exclusions would include those covering cash market transactions, instruments subject to the "forward contract" exclusion or the "Treasury amendment" of section 2(a)(1)(A), or securities options, stock-index warrants, or other instruments excluded under sections 2(a)(1)(B) and 4c(f).

The addition of section 4c(h) to the Act does not diminish, in any way, the CFTC's plenary authority with respect to commodity option transactions, including its authority to permit the issuance, offer, sale and trading of any commodity option subject to compliance with any other law of the United States which may be otherwise applicable.

Innovations in the financial marketplace have given rise to new "hybrid" products that combine the characteristics and functions of more traditional instruments, such as equity or debt securities, futures and options. Experience also shows that attempting to deter-

mine which regulatory scheme governs these innovative instruments can be very complex under existing law.

Under new section 4c(h), the CFTC's jurisdiction would be governed by a functional regulatory approach. If the option or futures component (or both) accounts for 50 percent or more of the overall value, or expected change in value or performance, respectively, of the hybrid instrument, it is subject to CFTC jurisdiction. If these tests are not met, then the Commodity Exchange Act would not apply and, if the instrument is a security, it would be governed by applicable securities laws.

In applying the functional test in new paragraph 4c(h) to futures instruments, it should be noted that futures positions can be replicated with a commodity options position. That is, any futures contract can be separated into basic option "building blocks." For example, a long futures contract can be replicated with a combination of a long call option and a short put option. (Such combined option positions are, in fact, referred to as "synthetic futures" and are often used by market professionals as a part of their trading strategies.) In applying this test, this principle can be used to break down the futures element of a hybrid instrument into two option components, to which a simple standard for valuing such options components can be applied.

The Committee expects that the Commission will act expeditiously to issue interpretative rules, after considering public comment, setting forth the methodology for applying this provision.

Section 304. Index participations

Section 304 amends section 4c(f) of the Act to include two new paragraphs aimed at clarifying the regulatory treatment of index participations. New paragraph 4c(f)(2) provides that nothing in the Act will be deemed to govern or in any way be applicable to any contract traded on a national securities exchange whereby any party to the contract acquires any interest in a stock index participation unit approved for trading by the Securities and Exchange Commission by order dated April 11, 1989, or pending such approval on or prior to December 31, 1990.

This paragraph excludes from the Commodity Exchange Act those index participations that the SEC had approved for trading in 1989 or were pending SEC approval at the end of 1990. Securities exchanges would be permitted to trade these products on which they had expended significant resources to develop and introduce prior to the conclusion of litigation over their appropriate regulations. See *Chicago Mercantile Exchange* v. *Securities and Exchange Commission,* 883 F.2d 537 (7th cir., 1989), cert. denied, —— U.S. ——. Index participations excluded from the Commodity Exchange Act under this provision would not be treated as contracts of sale for future delivery (or options thereon). This provision is not intended to affect the interpretation of pre-existing licensing agreements.

The introduction of other products will, of course, be governed by applicable law then in effect.

Registration

New paragraph 4c(f)(3) directs the Commission to utilize its existing authority under the Act to facilitate the registration of any person who is a "person associated with a broker or dealer" or "associated person of a broker or dealer," as those terms are defined in section 3(a)(18) of the Securities Exchange Act of 1934, for the purposes of marketing stock-index futures (or options thereon) to the public.

In this regard, the Committee notes that the current registration process in the futures industry basically consists of two components: (1) conducting a background check to determine whether the applicant is subject to any of the statutory disqualifications from registration set forth in the Act; and (2) ensuring that the applicant has passed an appropriate proficiency examination. The Committee notes also that general securities representatives are already subject to proficiency testing requirements in the securities industry. In light of these facts, the Committee feels that the application of the current testing requirements to general securities representatives who limit their activities to stock index products should be reviewed.

The Committee expects that the Commission will continue to consult with the Securities and Exchange Commission for the purpose of developing, to the extent feasible, comparable procedures and standards regarding the fitness and qualification for registration of industry professionals.

TITLE IV—EFFECTIVE DATE

Section 401. Effective date

This section provides that except as otherwise provided in this legislation, all amendments made therein will become effective on the date of enactment of this Act.

COST ESTIMATE

The Committee has requested a cost estimate of this legislation under the provision of section 403 of the Congressional Budget Act of 1974. The cost estimate of the congressional Budget Office appears below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 12, 1991.

Hon. PATRICK J. LEAHY,
Chairman, Committee on Agriculture, Nutrition and Forestry, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 207, the Future Trading Practices Act of 1991.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

ROBERT D. REISCHAUER,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number S. 207.

2. Bill title: Futures Trading Practices Act of 1991.

3. Bill status: As ordered reported by the Senate Committee on Agriculture, Nutrition, and Forestry, March 6, 1991.

4. Bill purpose: S. 207 would authorize appropriations for fiscal years 1992 through 1996 for the Commodity Futures Trading Commission (CFTC). Title II of the bill contains language aimed at preventing fraudulent trading practices and strengthening federal oversight of the futures industry. Title III would establish the authority of the Board of Governors of the Federal Reserve System over margin on stock-index futures contracts.

For fiscal year 1992, the bill would authorize appropriations for CFTC of $48 million. The appropriation for fiscal year 1991 was $44 million and the President has requested a 1992 appropriation of $47 million.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1992	1993	1994	1995	1996
Revenues from fees	3	6	10	14	16
Authorizations:					
Authorization level	48	56	62	68	72
Estimated outlays	42	55	61	67	71

Based on information provided by the General Accounting Office, we expect that the study of delivery points for agriculture commodity contracts would cost about $250,000 during fiscal years 1991 and 1992.

The costs of this bill fall primarily within budget function 370.

Basis of estimate: This estimate assumes that the full amounts authorized will be appropriated prior to the beginning of each fiscal year. Outlays are based on historical spending patterns of CFTC.

Based on information from the CFTC, CBO estimates that the service fees mandated by the bill would generate gross revenues of $4 million in 1992, $8 million in 1993, $14 million in 1994, $19 million in 1995, and $22 million in 1996. Net of income and payroll tax offsets, additional revenue to the federal government would be $3 million in 1992, $6 million in 1993, $10 million in 1994, $14 million in 1995, and $16 million in 1996. This estimate assumes that the CFTC is able to implement a new fee schedule by the beginning of fiscal year 1992. Fee revenues are expected to equal the maximums specified in the bill in 1992–1994 and to be slightly below the maximums in 1995 and 1996.

6. Pay-as-you-go considerations:

[By fiscal year, in millions of dollars]

	1991	1992	1993	1994	1995
Outlays	0	0	0	0	0
Receipts	0	3	6	10	14

The Budget Enforcement Act of 1990 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1995. The table above reflects the increase in federal revenues as a result of service fees authorized by this bill.

7. Estimated cost to State and local governments: None.

8. Estimate comparison: None.

9. Previous CBO estimate: On February 28, 1991, CBO transmitted to the House Committee on Agriculture a cost estimate for H.R. 707, the Commodity Furutes Improvements Act of 1991. The House bill would reauthorize CFTC for fiscal years 1992 and 1993 and would authorize slightly higher appropriations in fiscal year 1992 than in the Senate bill, but would authorize lower appropriations in fiscal year 1993. The House bill did not contain a provision authorizing service fees.

10. Estimate prepared by: Marjorie Miller and John Stell.

11. Estimate approved by: C.G. Nuckols, for James L. Blum, Assistant Director for Budget Analysis.

Regulatory Impact Evaluation

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee made the following evaluation of the regulatory impact that would be incurred in carrying out S. 207.

FUTURES TRADING PRACTICES

The regulatory impact of titles I and II is discussed in Senate Report 101-191 to accompany S. 1729, the Futures Trading Practices Act of 1989. These titles are substantially identical to the provisions of Division A of S. 1729.

INTERMARKET COORDINATION

With the exception of section 301 regarding margin, title III of the bill is designed to reduce regulatory burdens by excluding certain transactions in financial products from the scope of the Commodity Exchange Act and by providing the CFTC with the authority to exempt transactions which are inappropriate for futures-style regulation. These mechanisms, principally exemptive authority and a new "functional" approach to jurisdiction over hybrids, may impose some near-term costs on the private sector and on regulators, but these generally would be limited to that of applying for and processing statutory exemptions and, potentially, the cost of regulating new or expanded financial markets. The CFTC may reduce costs further through regulations which eliminate the need for case-by-case review of products. Ultimately, any such costs are likely to be offset by (1) savings from the avoidance of both judicial

and administrative litigation and (2) income generated by those new or expanded markets.

SECTION 301. MARGIN ON STOCK-INDEX FUTURES

This provision creates a minor additional regulatory burden for boards of trade designated as contract markets for trading stock-index futures contracts (and options thereon). These exchanges must notify the Board of Governors of the Federal Reserve System (or the Commission if this power is delegated) of changes in relevant margin levels. The Board (or the Commission) may in certain situations step in and direct the exchanges to modify those margin levels.

The burden, however, is balanced against several benefits that will accrue both to the exchange and the trading public as a result of this provision. The public will benefit from greater confidence that margins are set at appropriate levels and monitored by responsible Federal officials. This increased confidence may translate into greater public participation both in stock-index futures and equity markets generally, hence greater market liquidity and efficiency.

In the event that Federal regulators do intervene to direct that margins be adjusted to preserve the financial integrity of market institutions or prevent systemic risk, here too the regulated exchanges may ultimately benefit from avoiding the costs and reduced confidence stemming from a market disruption.

SECTION 302. EXEMPTIVE AUTHORITY

By empowering the CFTC to grant certain exemptions from the Commodity Exchange Act and directing it to exempt certain swaps and regulated bank instruments, this section creates a mechanism to reduce regulatory burdens on affected industries. Some new markets have been inhibited because, while their structure might make them inappropriate for futures-style exchange trading, other characteristics may place them under the full weight of Commodity Exchange Act regulations. In other cases, uncertainty may exist as to whether the market is properly classified as a futures contract, a forward contract, or some other type of instrument.

Exemptive authority allows the Commission formally to exempt these markets from futures-style regulation where they satisfy certain standards designed to protect the public interest.

In addition, the general exemptive power provided by the section permits the CFTC to lift specific regulatory burdens on regulated markets where such action is consistent with the public interest.

SECTION 303. HYBRID COMMODITY INSTRUMENTS

This provision, which creates a clear mathematical test for determining whether certain new "hybrid" financial products fall inside or outside the CFTC's jurisdiction, similarly is designed to lift regulatory burdens and facilitate the development of innovative new financial products. It imposes no new compliance or administrative burdens.

SECTION 304. INDEX PARTICIPATIONS

This provision excludes index participations predating December 31, 1990, from the Commodity Exchange Act. The provision imposes no regulatory costs. Instead, it creates an opportunity for securities markets to introduce trading in a new product which they have developed at great effort and expense. Similarly, by directing the CFTC to facilitate the registration of certain securities industry professionals, the provision lowers a regulatory hurdle and encourages access by the public to an important financial product.

AGENCY VIEWS

COMMODITY FUTURES TRADING COMMISSION,
Washington, DC, March 11, 1991.

Hon. PATRICK J. LEAHY,
Chairman, Committee on Agriculture, Nutrition, and Forestry, U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR CHAIRMAN LEAHY: The Commission is pleased to express its views on S. 207, the Futures Trading Practices Act of 1991, as reported by your Committee on March 6, 1991. We support this bill and believe it would increase public confidence in the integrity of futures markets by diminishing the potential for trade practice abuse and strengthening the Commission's regulatory system. We congratulate you and Ranking Minority Member, Senator Richard G. Lugar, in introducing and developing this important and far-reaching legislation.

We are pleased that the Committee acted favorably on the three new proposals regarding risk assessment of holding company systems, civil penalties in court actions and definitional reorganization we presented with my testimony of February 7, 1991. In addition, we believe the Committee has substantially improved the intermarket coordination provisions of Title III of the bill in adopting aspects of the Commission's suggestions to deal with these issues that I forwarded to you on February 19, 1991.

In preparation of the Senate's consideration of S. 207, I would like to set forth our views on the specific provisions of the bill.

TITLE I—CFTC FUNDING AND PERSONNEL

The Commission supports this provision. We understand that the service fees which we are authorized to impose by section 103 of Title I are not to exceed the specific amounts set forth in the bill for each fiscal year through 1996.

TITLE II—FLOOR SURVEILLANCE AND DUAL TRADING

Sec. 201. Duties of contract markets

The Commission supports this provision.

Sec. 202. Commission oversight; deficiency orders

The Commission generally supports section 202, including its provisions dealing with dual trading. In large part as a result of findings from a November 1989 study on dual trading and the joint CFTC-FBI investigation, the Commission in January 1990 proposed

restrictions on the practice of dual trading. The Commission's staff continues to analyze the more than three hundred public comments received and expects to prepare a final rule in mid-1991. The proposed rule contemplates further analysis on the breadth of the dual trading definition and the impact of the restrictions on low volume markets as well as more distant trading months.

However, we continue to be concerned over our new authority granted in section 202 to order the removal of exchange officials. In our view, individual misconduct is better addressed through traditional enforcement cases, the existing exchange disciplinary system, or exchange personnel procedures than within a framework designed to deal expeditiously with institutional deficiencies.

Sec. 203. Oral orders

The Commission supports this provision.

Sec. 211-212 Broker associations—Trading restrictions; disclosure

The Commission supports these provisions. As a result of a study of broker associations, the Commission in April 1990 issued a Notice of Proposed Rulemaking requiring the identification of broker associations and surveillance of their actions. Under the proposed rule, each exchange would be required to maintain rules addressing affiliations defined by the Commission as broker associations. These rules would require registration and the filing of other identifying information. The Commission received nine comment letters and is in the process of drafting a final rule on broker associations.

Sec. 221. Governing structure

We still have some concern over the aspect of this provision that imposes a 20 percent "nonmember" requirement for governing boards, and the separate requirement that 10 percent of governing boards be composed of particular commercial categories doing business in the principal commodities traded on the exchange. While we factor the concept of board diversity, we are concerned that a statutory quota system may not always achieve the desired results.

Secs. 231-233. Floor trader registration

The Commission supports these provisions.

Sec. 241. Civil damages; liability of futures commission merchants

Section 241 provides that a futures commission merchant which selected a floor broker to execute a customer order and which is responsible under section 2(a)(1) of the Act for the floor broker's violation in executing the order, may be required to satisfy any award to the customer if the floor broker fails to do so. This would apply in a reparations case, a private lawsuit under section 22 of the Act, or in arbitration conducted by a contract market or a registered futures association. The futures commission merchant could be called upon to satisfy the full amount of actual damages to the customer. In addition, in the case of a willful and intentional violation, the futures commission merchant could be required to pay the full amount of punitive or exemplary damages of up to two times the amount of proximately caused damages if the futures commis-

sion merchant willfully selected the floor broker with the intention of assisting or facilitating the floor brokers's violation.

The Commission generally supports these provisions. To the extent that this section codifies the concepts of respondeat superior already contained in section 2(a)(1) of the Act, it does not change existing law but rather explicitly recognizes the principal/agent relationship between futures commission merchants and floor brokers in certain circumstances.

Specifically, we understand that, by its references to floor brokers whom the futures commission merchant selects, section 241 is directed to the conduct of so-called independent floor brokers with whom the futures commission merchant has come contractual or other selection arrangement. Thus, we do not understand the bill to address floor brokers who are employees of futures commission merchants or to require customers to first seek payment of actual damage awards from such floor brokers. Rather, the customer may seek to require the futures commission merchant to satisfy the award at the outset. This is consistent with current practice in reparations where firms are held jointly and severally liable for the damage award with their employees under section 2(a)(1).

In this regard, however, our one concern with section 241 is that the customer will be required to proceed first against the "independent" broker for actual damages even if the customer establishes that the broker was acting within the scope of the agency under section 2(a)(1). We view this as a retreat from a customer protection aspect of existing law which does not impose this requirement in the case of principals held liable for actual damages resulting from the acts of their non-employee agents. If this is an inadvertent error in drafting, it should be rectified on the Senate floor.

Sec. 242. Customer restitution

A majority of the Commission did not support empowering the Commission to order restitution in administrative cases. The Act already affords customers three separate remedies to seek redress—private rights of action in federal court, the Commission's reparations program, and exchange and futures association arbitration. In addition, the Commission can and does seek disgorgement where appropriate in injunctive cases in federal district court. The Commission believes that customers would be better advised to move promptly to use one of the broad range of existing remedies the Act provides to seek damages at the outset of their claim rather than await the outcome of a Commission investigation and administrative trial. The Commission believes this provision heightens customer expectations for restitution which very likely may not be met because often there are not funds available to restore to agrrieved customers in many administrative cases brought by the Commission.

Sec. 243. Increased penalties

The Commission supports this provision.

Sec. 244. Assessment of money penalties; collection of penalties

The Commission supports this provision.

Sec. 245. False information to self-regulatory organizations

The Commission supports this provision.

Sec. 246. Willful violations; false and misleading statements

This provision adds a new section 9(h) to the Act that would make it a felony to "knowingly" and willfully violate any provision of the Act or a Commission rule or to make false statements in documents required to be filed with the Commission or in applications for membership in a contract market or futures association. A person may not be found to have acted "knowingly" for purposes of section 9(h) if the person had no knowledge of the requirement violated.

The Commission remains concerned over the lack of guidance in section 246 on how this new felony provision should be integrated with the various subsections of existing section 9 which differentiate between violations of specific sections of the Act and regulations by making some misdemeanors and others felonies. Moreover, by its references to "knowing" behavior, the bill seems to provide an incentive for industry professionals to remain ignorant of statutory and regulatory requirements by making ignorance of the law a defense. In this regard, the bill is seemingly at odds with its intended purpose of adding a strong, new general criminal provision to the Act.

Sec. 247. Complaints against registered persons; class action suits

The Commission remains convinced that the establishment of a "class action" option in reparations is unnecessary. Reparations claims generally would not qualify for class action treatment because they usually depend upon unique, fact-intensive, circumstances, such as the particular futures contract or other instrument involved, the relative financial sophistication of the customer, the particular representations made by a respondent, and the degree of the complainant's reliance on thos representations. However, the Commission would support report language encouraging an evaluation of the reparations program to ensure it is meeting its congressionally mandated goals and to recommend improvements if necessary.

Sec. 248. Penalties study and guidelines

The Commission supports this provision.

Sec. 249. Civil penalties in court actions

Section 249 will enable the Commission to seek and the court to impose civil monetary penalties in enforcement actions in district court. In bringing enforcement actions, the Commission may currently choose between the equitable relief available in federal court actions brought under section 6c (i.e., injunctions, appointments of receivers, or orders of restitution or disgorgement), and the administrative remedies provided for in section 6(b) of the Act. However, the Commission cannot obtain both and injunction and a civil penalty in a single enforcement action. Authorizing the Commission to seek civil penalties in federal court actions brought pursuant to section 6c would permit a wider array of sanctions to be used in a

single action. This may both eliminate delays and resource demands associated with duplicative enforcement actions, and will allow the Commission and federal courts to use a more varied and more effective package of sanctions in a single forum. The Commission intends to seek civil penalty assessments that will not divert assets that would be more appropriately used for disgorgement, or in instances where disgorgement would not be an effective remedy.

Secs. 251-257. Assistance to foreign futures authorities

The Commission supports this provision, but continues to be very concerned about the absence from the bill of our proposed amendment and conforming changes to protect from compelled disclosure confidential information provided to the Commission by foreign futures authorities. Concerns have been raised by foreign futures authorities about the confidentiality of information they provide to the Commission. This language is critically important to the Commission's ability to obtain full cooperation in enforcement matters from these authorities.

The Commission's proposal was approved in the House version of the CFTC's reauthorization in 1989 and again on March 5 of this year. The recently enacted Securities Acts Amendments of 1990 also contain provisions similar to the Commission's proposal and has already enhanced the SEC's ability to share information with foreign authorities. As you know, section 8 of the Commodity Exchange Act already protects certain categories of information from public disclosure and reflects the particular sensitivity of Congress to the need to protect confidential information in the possession of the Commission. Accordingly, we urge the Senate to add our proposed language to S. 207 so that it will parallel the new SEC authority as well as the Commission's reauthorization legislation passed by the House in H.R. 707.

Sec. 261. Ethics training for registrants

The Commission supports this provision.

Sec. 262. Undercover operations and enforcement

We are pleased that S. 207 recognizes the importance of this law enforcement tactic, however the Commission prefers the House version concerning undercover authority. Nevertheless, we still believe the current structure is the appropriate one—where the Federal Bureau of Investigation, which has the training and resources to engage in this activity, actually implements the undercover portion of an investigation. In our view this has proven to be a highly successful form of effective coopertion among civil and criminal law enforcement agencies.

Sec. 263. Access by GAO to information maintained by self-regulatory organizations

We continue to question the need for this provision. GAO regularly has been able to obtain industry data on a timely basis, either through access to information already in our possession, or by our making a special request for the data at the behest of GAO. In our experience, these existing procedures have worked well and strike

an appropriate balance between the information from unnecessary and duplicative demands from multiple overseers.

Sec. 264. Enhancement of registration requirements

The Commission supports this provison.

Sec. 265. Suspension of registrants charged with felonies

This provision empowers the Commission to suspend or modify the registration of any person who has been indicted or otherwise charged by prosecutors with a violation of certain Federal or state laws punishable as a felony, if the Commission determines that continued or unmodified registration may pose a threat to the public interest or may threaten to impair public confidence in any market. We support the intent of this provision. We note, however, that it will generally take longer for the Commission to suspend or restrict the registration of indicted persons under this approach than if we were permitted to suspend or modify the registration first and then provide the registrant with an opportunity for a hearing to show why continued registration would not pose a threat to the marketplace.

Sec. 266. Prohibition against insider trading

The Commission supports new section 9(i) of the Act which will make it a felony for employees of self-regulatory organizations or members of their governing boards and committees, contrary to Commission regulations, willfully and knowingly to trade on the basis of, or to disclose for non-official purposes, any material, non-public information.

Sec. 267. International competitiveness of electronic trading systems

We remain strongly opposed to this provision. Section 267 would direct the Commission to facilitate the development and operation of computerized trading. We certainly support innovations to trading systems, including computerization, and we already expend substantial time reviewing and monitoring the implementation of new electronic systems. However, we do not believe a financial regulator should be in the forefront of research and development. Our mission should be to assess the innovations which the industry develops for compliance with the standards Congress imposes to assure fair and orderly trading. We are concerned that under this provision we would be required, for example, to develop or design improvements to trading systems presented to us which fail to meet those standards. If so, then the Commission would have to reallocate a substantial amount of its resources from its regulatory and enforcement duties to functions which are more properly performed by the private sector.

Additionally, section 267 directs the Commission to facilitate the development and operation of computerized trading "as an adjunct to the open outcry auction system." The Commission does not read this provision to limit in any manner its existing authority to approve any trading system, including a fully computerized system not linked to an open outcry system, that the Commission determined complies with the Act and the regulations thereunder. The Commission would appreciate report language to that effect.

Section 267 would also direct the Commission to cooperate with Executive Branch Departments and the Office of the U.S. Trade Representative in order to remove trade barriers that may be imposed by a foreign nation on the international use of electronic trading systems. We are concerned that the Commission arguably could be constrained to subordinate its views on appropriate integration of domestic and foreign regulatory cooperation if these could be viewed as impediments to the removal of trade barriers. Moreover, in our view trade issues are better addressed outside the reauthorization process of the Commodity Exchange Act.

Sec. 268. Interest of Producers of Agricultural Commodities

Section 268 requires the Commission, in discharging its duties under the Act, to take into consideration and endeavor to serve the interests of producers of agricultural commodities consistent with the Commission's responsibility to protect the public interest served by, and integrity of, futures and options markets. The Commission would be required to include in its annual reports to Congress information regarding its actions to implement this section.

The Act recognizes that the important economic functions of price discovery and risk transfer performed by futures and option markets serve all commercial interests and the consuming public. To perform these functions properly, there must be open and fair futures and options trading. Thus, in discharging its regulatory duties, the Commission must be price neutral and must consider the interests of market users, consumers, processors, merchandisers, as well as those of producers. Indeed, this was one of the primary reasons a Commission independent of the Agriculture Department was created in 1974. The Commission should not be required to elevate one interest group's concerns above all others. For these reasons the Commission cannot support this provision.

Sec. 269. Appeals be registered futures associations

The Commission opposes this change in existing law. In December 1985, the Commission proposed to Congress that only respondents in association disciplinary actions should have the right to appeal Commission decisions reviewing their cases. NFA itself testified in support of this refinement in the appellate process. Congress enacted this concept into law as part of the Futures Trading Act of 1986.

Registered futures associations exist only because Congress provided enabling authority for their creation in 1974. Further, some of the unique aspects of futures associations, such as mandatory membership, dictate that the Commission exercise its oversight responsibilities with extreme care. The ability of a respondent to appeal an NFA disciplinary sanction to the Commission was intended as protection for the respondent, a vital protection in light of the requirement of mandatory membership. The NFA itself does not need such protection because, other than the possibility of reversal or having a case remanded, it faces no adverse legal consequences when its decisions are overruled. Further, in certain circumstances respondents could be severely disadvantaged by an NFA appeal because they may be forced to continue litigating their case against a well-funded NFA. We question whether this type of

litigation is an appropriate use of the mandatory membership and transaction fees which fund NFA.

Sec. 270. Telemarketing fraud

The Commission supports this provision.

Sec. 271. Venue; service of process

The Commission supports this provision.

Sec. 272. Risk assessment for holding company systems

This new authority will enable the Commission to adopt rules requiring futures commission merchants to provide reports regarding the activities of affiliated persons that are reasonably likely to materially affect the financial or operational condition of such entities. The section also would enable the Commission to adopt rules requiring a futures commission merchant to obtain information and make and keep records concerning the futures commission merchant's policies, procedures or systems for monitoring and controlling financial and operational risks to it resulting from the activities of any of its affiliated persons.

The Commission intends to make use of its authority under this provision to avoid imposing unnecessary paperwork burdens and, as in the case of its other financial reporting requirements, to take into account information collected by other financial regulatory agencies.

Sec. 273. Study of delivery points for agricultural commodity contracts.

The Commission shares the Committee's concern about issues that have arisen in recent years regarding the currently specified delivery points of several major grain and soybean futures contracts. However, we question the need for section 273 since GAO has already undertaken a study in this area. In addition, the Commission is closely following several other studies being conducted by academics and other groups regarding delivery points. Further, the Commission and its staff have reviewed other delivery point issues in the context of exchange rule changes for commodities such as frozen concentrated orange juice and coffee. Commission staff is currently conducting its own analysis of the adequacy of existing delivery provisions.

Sec. 274. Reorganization of section 2(a)(1)(A).

In its present form section 2(a)(1)(A) is extremely confusing in the organization of its definitional, jurisdictional and other provisions. New section 274 will reorganize section 2(a)(1)(A) in order to eliminate this confusion and to facilitate reference to its provisions.

TITLE III—INTERMARKET COORDINATION

Sec. 301. Authority over margin on stock index futures

In my testimony before the Committee on February 7, I expressed the Commission's concern that title III as introduced implied that the Federal Reserve Board should use its new authority over stock index futures margins to assess and control factors that

were unrelated to the prudential purposes that futures margins currently serve. We also expressed concern that title III provided no certainty that the exchanges would be delegated day-to-day margin setting authority, that the CFTC would be consulted, or that different margin rules would be considered for hedgers, spreaders or locals. Nevertheless, we expressed a willingness to work with the Committee to resolve these concerns if Congress believes that the government's role in margin-setting should be increased. In that spirit we transmitted a margin proposal to you on February 19 to give the Commission new margin authority to preserve the financial integrity of the exchange or its clearing system in the event of a threatened market disruption.

At its March 6th markup on S. 207 the Committee adopted section 301 as a modified version of the original margin provision and the Commission's alternative. Under the Committee's substitute, an exchange must file its stock index futures and options margin rules with the Board of Governors of the Federal Reserve System. The Board is empowered at any time to request any exchange to set margin in the these contracts at such levels as the Board determines are appropriate to preserve the financial integrity of the exchange or its clearing system or to prevent systemic risk and, if the exchange fails to do so, the Board may direct the exchange to alter or supplement the rules of the contract market as specified in the request. The Board may delegate any or all of its authority under section 301 only to the Commission.

We believe the Committee substitute strikes an appropriate balance between the interests of the exchanges in maintaining their day-to-day control over margin levels and the government's interest in assuring that the exchanges react promptly and appropriately to protect their financial integrity. The Commission supports the substitute provision.

Sec. 302. Exemptive authority

The Commission supports this provision and is pleased that the Committee refined the original version of this provision to provide the Commission with additional flexibility to grant exemptions only for those instruments that meet certain conditions and have adequate financial protection and other customer safeguards.

Sec. 303. Hybrid commodity instruments

Section 303 incorporates the regulatory approach advocated by the Commission to address innovations in the financial marketplace that have given rise to new "hybrid" products that combine the characteristics and functions of more traditional instruments, such as equity or debt securities, futures and options. The Commission understands that section 303 concerns only hybrid instruments. Traditional futures and stock issuances are not affected.

Under section 303 if a product could be viewed as part future and part security, the determination of CFTC jurisdiction would be governed by a functional regulatory approach incorporating a predominant purpose test. The predominance purpose test divides hybrid instruments between those which predominantly reflect an investment in an enterprise and those which are predominantly a commodity play. That is, the Commodity Exchange Act would not

apply to, and the CFTC would not regulate, a hybrid product if, in the case of a product having elements of an option, less than 50 percent of its value at issuance derives from the value of the commodity option, or, in the case of an instrument having elements of a futures contract, at the date of issuance less than 50 percent of the change in its value or its performance is expected to be due to movement in the price of the commodity. In this event if the instrument is a security, it would be subject to regulation under the securities laws. On the other hand, if the option and/or futures component accounts for at least 50 percent of the overall value, or change in value, respectively, of the hybrid instrument, it would be subject to CFTC regulatory jurisdiction under the Act.

The Commission understands that under its existing authority it could develop rules to implement section 303 that would set forth the procedures and criteria under which it would assess the characteristics of new instruments to determine whether or not they are subject to the Commission's jurisdiction.

Sec. 304. Stock index participations

Section 304 incorporates a Commission proposal to exclude from the Commodity Exchange Act those stock index participations (IPs) that the Securities and Exchange Commission had approved for trading in 1989 or were pending SEC approval at the end of 1990. This provision is intended to resolve the unfortunate jurisdictional dispute that occurred despite the CFTC's efforts to reach regulatory solutions designed to allow IPs as proposed by the securities exchanges to trade under the CEA without the need to resort to litigation. The effect of section 304 will be to permit the securities exchanges to trade existing products which they had expended significant resources to develop and introduce prior to the Court of Appeals ruling that IPs are futures contracts. In this regard, section 304 will make the court's decision inapplicable to the IPs involved in the litigation; it is not otherwise intended, however, to affect the validity of the court's decision or reasoning.

Section 304 also requires the Commission to use its existing authority to facilitate the registration of any person who is a "person associated with a broker or dealer" or "associated person of a broker or dealer," as those terms are defined in the Securities Exchange Act of 1934, for the purposes of marketing stock index futures (or options thereon) to the public. In this regard the Commission intends to continue to consult with the Securities and Exchange Commission for the purpose of developing, to the extent feasible, comparable procedures and standards regarding the fitness and qualification for registration of industry professionals.

We appreciate this opportunity to present our views to the Committee. Please be assured that notwithstanding the concerns expressed, we strongly support the purposes of S. 207 of increasing public confidence in the integrity of the futures markets and strengthening the Commission's regulatory systems.

Very truly yours,

WENDY L. GRAMM,
Chairman.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 207, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMMODITY EXCHANGE ACT

For the prevention and removal of obstructions and burdens upon interstate commerce in grain, by regulating transactions on grain future exchanges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [1] That this Act may be cited as the "Commodity Exchange Act".

SEC. 1a. DEFINITIONS.

As used in this Act:

(1) BOARD OF TRADE.--The term "board of trade" means any exchange or association, whether incorporated or unincorporated, of persons who are engaged in the business of buying or selling any commodity or receiving the same for sale on consignment.

(2) COMMISSION.—The term "Commission" means the Commodity Futures Trading Commission established under section 2(a)(2).

(3) COMMODITY.—The term "commodity" means wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in Public Law 85-839 (7 U.S.C. 13-1), and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in.

(4) COMMODITY POOL OPERATOR.—The term "commodity pool operator" means any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market, except that the term does not include such persons not within the intent of the definition of the term as the Commission may specify by rule, regulation, or order.

(5) COMMODITY TRADING ADVISOR.—

(A) IN GENERAL.--Except as otherwise provided in this paragraph, the term "commodity trading advisor" means any person who—

(i) for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in—

(I) any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market;

(II) any commodity option authorized under section 4c; or

(III) any leverage transaction authorized under section 19; or

(ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i).

(B) EXCLUSIONS.—Subject to subparagraph (C), the term "commodity trading advisor" does not include—

(i) any bank or trust company or any person acting as an employee thereof;

(ii) any news reporter, news columnist, or news editor of the print or electronic media, or any lawyer, accountant, or teacher;

(iii) any floor broker or futures commission merchant;

(iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees;

(v) the fiduciary of any defined benefit plan that is subject to the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1001 et seq.);

(vi) any contract market; and

(vii) such other persons not within the intent of this paragraph as the Commission may specify by rule, regulation, or order.

(C) INCIDENTAL SERVICES.—Subparagraph (B) shall apply only if the furnishing of such services by persons referred to in subparagraph (B) is solely incidental to the conduct of their business or profession.

(D) ADVISORS.—The Commission, by rule or regulation, may include within the term "commodity trading advisor", any person advising as to the value of commodities or issuing reports or analyses concerning commodities if the Commission determines that the rule or regulation will effectuate the purposes of this paragraph.

(6) CONTRACT OF SALE.—The term "contract of sale" includes sales, agreements of sale, and agreements to sell.

(7) COOPERATIVE ASSOCIATION OF PRODUCERS.—The term "cooperative association of producers" means any cooperative association, corporate, or otherwise, not less than 75 percent in good faith owned or controlled, directly or indirectly, by producers of agricultural products and otherwise complying with the Act of February 18, 1922 (42 Stat. 388, chapter 57; 7 U.S.C. 291 and 292), including any organization acting for a group of such associations and owned or controlled by such associations, except that business done for or with the United States, or any agency

thereof, shall not be considered either member or nonmember business in determining the compliance of any such association with this Act.

(8) FLOOR BROKER.—The term "floor broker" means any person who, in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person any commodity for future delivery on or subject to the rules of any contract market.

(9) FLOOR TRADER.—The term "floor trader" means any person who, in or surrounding any pit, ring, post, or other place provided by a contract market for the meeting of persons similarly engaged, purchases, or sells solely for such person's own account, any commodity for future delivery on or subject to the rules of any contract market.

(10) FOREIGN FUTURES AUTHORITY.—The term "foreign futures authority" means any foreign government, or any department, agency, governmental body, or regulatory organization empowered by a foreign government to administer or enforce a law, rule, or regulation as it relates to a futures or options matter, or any department or agency of a political subdivision of a foreign government empowered to administer or enforce a law, rule, or regulation as it relates to a futures or options matter.

(11) FUTURE DELIVERY.—The term "future delivery" does not include any sale of any cash commodity for deferred shipment or delivery.

(12) FUTURES COMMISSION MERCHANT.—The term "futures commission merchant" means an individual, association, partnership, corporation, or trust that—

(A) is engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market; and

(B) in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

(13) INTERSTATE COMMERCE.—The term "interstate commerce" means commerce—

(A) between any State, territory, or possession, or the District of Columbia, and any place outside thereof, or

(B) between points within the same State, territory, or possession, or the District of Columbia, but through any place outside thereof, or within any territory or possession, or the District of Columbia.

(14) INTRODUCING BROKER.—The term "introducing broker" means any person (except an individual who elects to be and is registered as an associated person of a futures commission merchant) engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

(15) MEMBER OF A CONTRACT MARKET.—The term "member of a contract market" means an individual, association, partnership, corporation, or trust owning or holding membership in, or admitted to membership representation on, a contract market or given members' trading privileges thereon.

(16) PERSON.—The term "person" imports the plural or singular, and includes individuals, associations, partnerships, corporations, and trusts.

[DEFINITIONS; LIABILITY OF PRINCIPAL FOR ACT OF AGENT]

SEC. 2. (a)(1)(A) [For the purposes of this Act "contract of sale" shall be held to include sales, agreements to sale, and agreements to sell. The word "person" shall be construed to import the plural or singular, and shall include individuals, associations, partnerships, corporations, and trusts. The word "commodity" shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs, Solanum tuberosum (Irish potatoes), wool, wool tops, fats and oils (including lard, tallow, cottonseed oil, peanut oil, soybean oil, and all other fats and oils), cottonseed meal, cottonseed, peanuts, soybeans, soybean meal, livestock, livestock products, and frozen concentrated orange juice, and all other goods and articles, except onions as provided in Public Law 85-839, and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in: *Provided,* That the Commission] (i) The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in subparagraph (B) of this paragraph, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 5 of this Act or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 19 of this Act: [*And provided further,* That, except] *except* as hereinabove provided, nothing contained in this section shall [(i)] (*I*) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or [(ii)] (*II*) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. (*ii*) Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof the future delivery conducted on a board of trade. [The term "future delivery," as used herein, shall not include any sale of any cash commodity for deferred shipment or delivery. The words "board of trade" shall be held to include and mean any exchange or association, whether in-

corporated or unincorporated, of persons who shall be engaged in the business of buying or selling any commodity or receiving the same for sale on consignment.] The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person. [The words "interstate commerce" shall be construed to mean commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof, or within any Territory or possession, or the District of Columbia. The words "cooperative association of producers" shall mean any cooperative association, corporate or otherwise not less than 75 per centum in good faith owned, or controlled, directly or indirectly, by producers of agricultural products and otherwise complying with an Act of Congress of February 18, 1922 (U.S.C. 1934 ed., title 7, secs. 291 and 292), as now or hereafter amended, including any organization acting for a group of such associations and owned or controlled by such associations, provided that business done for or with the United States of America, or any agency thereof, shall not be considered either member or nonmember business in determining the compliance of any such association with said Act of Congress of February 18, 1922. The words "member of a contract market" shall mean and include individuals, associations, partnerships, corporations, and trusts owning or holding membership in, or admitted to membership representation on, a contract market or given members' trading privileges thereon. The words "futures commission merchant" shall mean and include individuals, associations, partnerships, corporations, and trusts engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market and that, in or in connection with such solicitation or acceptance of orders, accepts any money, securities, or property (or extends credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom. The term "introducing broker" shall mean any person, except an individual who elects to be and is registered as an associated person of a futures commission merchant, engaged in soliciting or in accepting orders for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom. The words "floor broker" shall mean any person who, in or surrounding any "pit", "ring", "post", or other place provided by a contract market for the meeting of persons similarly engaged, shall purchase or sell for any other person any commodity for future delivery on or subject to the rules of any contract market. The words "the Commission" shall mean the Commodity Futures Trading Commission established under paragraph (2) of this subsection. The term "commodity trading advisor" shall mean any person who, for compensation or profit, engages in the business of advising others, either di-

rectly or through publications, writings or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market, any commodity option authorized under section 4c, or any leverage transaction authorized under section 19, or who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing; but such term does not include (i) any bank or trust company or any person acting as an employee thereof, (ii) any news reporter, news columnist, or news editor of the print or electronic media, or any lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees, (v) the fiduciary of any defined benefit plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974, (vi) any contract market, and (vii) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order: *Provided,* That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession: *Provided further,* That the Commission, by rule or regulation, may include within this definition, any person advising as to the value of commodities or issuing reports or analyses concerning commodities, if the Commission determines that such rule or regulation will effectuate the purposes of this provision. The term "commodity pool operator" shall mean any person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.]

* * * * * * *

(8)(A) The Commission shall, in cooperation with the Secretary of Agriculture, maintain a liaison between the Commission and the Department of Agriculture. The Secretary shall take such steps as may be necessary to enable the Commission to obtain information and utilize such services and facilities of the Department of Agriculture as may be necessary in order to maintain effectively such liaison. In addition, the Secretary shall appoint a liaison officer, who shall be an employee of the Office of the Secretary, for the purpose of maintaining a liaison between the Department of Agriculture and the Commission. The Commission shall furnish such liaison officer appropriate office space within the offices of the Commission and shall allow such liaison officer to attend and observe all deliberations and proceedings of the Commission.

(B)(i) The Commission shall maintain communications with the Department of the Treasury, the Board of Governors of the Federal Reserve System, and the Securities and Exchange Commission for the purpose of keeping such agencies fully informed of Commission

activities that relate to the responsibilities of those agencies, for the purpose of seekings the views of those agencies on such activities, and for considering the relationships between the volume and nature of investment and trading in contracts of sale of a commodity for future delivery and in securities and financial instruments under the jurisdiction of such agencies.

(ii) When a board of trade applies for designation as a contract market involving transactions for future delivery of any security issued or guaranteed by the United States or any agency thereof, the Commission shall promptly deliver a copy of such application to the Department of the Treasury and the Board of Governors of the Federal Reserve System. The Commission may not designate a board of trade as a contract market based on such application until forty-five days after the date the Commission delivers the application to such agencies or until the Commission receives comments from each of such agencies on the application, whichever period is shorter. Any comments received by the Commission from such agencies shall be included as part of the public record of the Commission's designation proceeding. In designating, or refusing, suspending, or revoking the designation of, a board of trade as a contract market involving transactions for future delivery referred to in this clause or in considering possible emergency action under section 8a(9) of this Act with respect to such transactions, the Commission shall take into consideration all comments it receives from the Department of the Treasury and the Board of Governors of the Federal Reserve System and shall consider the effect that any such designation, suspension, revocation, or emergency action may have on the debt financing requirements of the United States Government and the continued efficiency and integrity of the underlying market for government securities.

(iii) The provisions of this subparagraph shall not create any rights, liabilities, or obligations upon which actions may be brought against the Commission.

(vi)(I) Notwithstanding any other provision of this Act, any contract market in a stock index futures contract (or option thereon) shall file with the Board of Governors of the Federal Reserve System any rule establishing or changing the levels of margin (initial and maintenance) for the stock index futures contract (or option thereon).

(II) The Board may at any time request any contract market to set the margin for any stock index futures contract (or option thereon) at such levels as the Board in its judgment determines are appropriate to preserve the financial integrity of the contract market or its clearing system or to prevent systemic risk. If the contract market fails to do so within the time specified by the Board in its request, the Board may direct the contract market to alter or supplement the rules of the contract market as specified in the request.

(III) Subject to such conditions as the Board may determine, the Board may delegate any or all of its authority under this clause only to the Commission.

(IV) Nothing in this clause shall supersede or limit the authority granted to the Commission in section 8a(9) to direct a contract market, on finding an emergency to exist, to raise temporary emer-

gency margin levels on any futures contract or option on the contract covered by this clause.

(V) Any action taken by the Board under this clause directing a contract market to alter or supplement a contract market rule shall be subject to review only in the Court of Appeals where the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit. The review shall be based on the examination of all information before the Board at the time the determination was made. The court reviewing the Board's action shall not enter a stay or order of mandamus unless the court has determined, after notice and a hearing before a panel of the court, that the agency action complained of was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

[RESTRICTION OF FUTURES TRADING TO CONTRACT MARKETS]

SEC. 4. (a) [It shall be unlawful] *unless exempted by the Commission pursuant to subsection (c) or (d), it shall be unlawful* for any person to offer to enter into, to enter into, to execute, to confirm the execution of, or to conduct any office or business anywhere in the United States, its territories or possessions, for the purpose of soliciting, or accepting any order for, or otherwise dealing in, any transaction in, or in connection with, a contract for the purchase or sale of a commodity for future delivery (other than a contract which is made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions) unless—

(1) such transaction is conducted on or subject to the rules of a board of trade which has been designated by the Commission as a "contract market" for such commodity;

(2) such contract is executed or consummated by or through a member of such contract market; and

(3) such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided,* That each contract market member shall keep such record for a period of three years from the date thereof, or for a longer period if the Commission shall so direct, which record shall at all times be open to the inspection of any representative of the Commission or the Department of Justice.

(b) The Commission may adopt rules and regulations proscribing fraud and requiring minimum financial standards, the disclosure of risk, the filing of reports, the keeping of books and records, the safeguarding of customers' funds, and registration with the Commission by any person located in the United States, its territories or possessions, who engages in the offer or sale of any contract of sale of a commodity for future delivery that is made or to be made on or subject to the rules of a board of trade, exchange, or market located outside the United States, its territories or possessions. Such rules and regulations may impose different requirements for such persons depending upon the particular foreign board of trade, exchange, or market involved. No rule or regulation may be adopted by the Commission under this subsection that (1) requires Com-

mission approval of any contract, rule, regulation, or action of any foreign board of trade, exchange, or market, or clearinghouse for such board of trade, exchange, or market, or (2) governs in any way any rule or contract term or action of any foreign board of trade, exchange, or market, or clearinghouse for such board of trade, exchange, or market.

(c)(1) In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, may (on application of any person) exempt any agreement, contract, or transaction (or classes thereof) otherwise subject to subsection (a) (including any person or class of persons offering, entering into, or rendering advice with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods, from any of the requirements of subsection (a), or from any other provision of this Act except section 2(a)(1)(B), if the Commission determines, after notice and opportunity for hearing, that the exemption would be consistent with the public interest.

(2) The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) unless the person seeking the exemption demonstrates to the satisfaction of the Commission that—

(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between institutional participants;

(ii) will be entered into in connection with a line of business or for hedging or risk management purposes; and

(iii) will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under this Act.

(3) The Commission, after notice and opportunity for hearing, shall have the authority to revoke any exemption previously granted if the Commission determines that any of the minimum requirements prescribed in paragraph (2), or any additional conditions imposed by the Commission, is no longer being satisfied.

(4) For purposes of this subsection, the term "institutional participant' shall be limited to the following persons or classes thereof that the Commission determines have the financial and other qualifications adequate to fulfill the terms and conditions of the agreement, contract, or transaction:

(A) A bank or trust company (acting in an individual or fiduciary capacity).

(B) A savings and loan institution.

(C) An insurance company.

(D) A registered investment company under the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.).

(E) A commodity pool subject to regulation under this Act.

(F) A corporation, partnership, proprietorship, organization, trust, or other business entity with a net worth exceeding $1,000,000.

(G) An employee benefit plan with assets exceeding $1,000,000, or whose investment decisions are made by a bank, insurance company, investment adviser registered under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.), or a registered commodity trading advisor under such Act.

(H) Any department or agency of the United States, any State or political subdivision thereof, or any foreign government or political subdivision thereof.

(I) A broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.) acting on its own behalf or on behalf of another institutional participant.

(J) A futures commission merchant, floor broker, or floor trader registered under this Act acting on its own behalf or on behalf of another institutional participant.

(K) Such other persons that the Commission determines have such financial and other qualifications.

(d)(1) This Act shall not apply to any swap agreement or class of swap agreements (as defined in section 101(49) of title 11, United States Code) where—

(A) each party enters into the swap agreement to hedge or manage a business related price risk; and

(B) each party reasonably expects to perform fully its obligations to make or receive payments at the time or times specified in the swap agreement.

(2) To the extent that any swap agreement or class of swap agreements (as defined in section 101(49) of title 11, United States Code) may be considered to be subject to regulation under this Act, the Commission shall, by rule, regulation, or order, following notice and an opportunity for a hearing, exempt from any or all of the prohibitions and requirements of this Act, including section 2(a)(1)(B), any such swap agreement if the Commission determines that—

(A) the exemption would not be contrary to the public interest;

(B) each party to the swap agreement is an institutional participant (as defined in subsection (c)(4));

(C) the creditworthiness of each party to the swap agreement would be a material term of the negotiation of the swap agreement; and

(D) the swap agreement is not designed to and would not result in a trading market in the swap agreement.

(3) To the extent that any demand deposit, time deposit, or transaction account (as defined in subsections (b)(1), (c)(1), and (e), respectively, of section 204.2 of title 12, Code of Federal Regulations (as in effect on the date of enactment of this subsection)) whether indexed or otherwise, may be considered to be subject to regulation under this Act, the Commission shall, by rule, regulation, or order, following notice and an opportunity for a hearing, exempt from any or all prohibitions and requirements of this Act, including section 2(a)(1)(B), any such deposit or account if the Commission determines that—

(A) the deposit or account is offered by—

(i) a United States financial institution that is insured by a United States governmental agency or United States chartered corporation; or

(ii) a United States branch or agency of a foreign bank that is licensed under the laws of the United States and regulated, supervised, and examined by United States Federal authorities having regulatory responsibilities for the financial institutions or under the laws of any State and regulated, supervised, and examined by State authorities providing regulatory supervision comparable to that provided by United States banking authorities, and the regulators oversee the financial integrity and customer protection of the deposits; and

(B) the exemption would not be contrary to the public interest.

* * * * * * *

[PROHIBITED TRANSACTIONS]

SEC. 4c. (a) It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) if such transaction is, is of the character of, or is commonly known to the trade as a "wash sale", "cross trade", or "accommodation trade", or is a fictitious sale; or

(B) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with board of trade rules applying to such transactions and such rules shall have been approved by the Commission.

(b) * * *

(c) * * *

* * * * * * *

[(f) Nothing in this Act shall be deemed to govern or in any way be applicable to any transaction in an option on foreign currency traded on a national securities exchange.]

(f)(1) Nothing in this Act shall be considered to govern or in any way be applicable to any transaction in an option on foreign currency traded on a national securities exchange.

(2) Nothing in this Act shall be considered to govern or in any way be applicable to any contract traded on a national securities exchange whereby any party to the contract acquires any interest in a stock index participation unit approved for trading by the Securities and Exchange Commission by order dated April 11, 1989, or pending the approval on or prior to December 31, 1990.

(3) The Commission shall utilize its authority under this Act to facilitate the registration of any person who is a person associated with a broker or dealer, or an associated person of a broker or

dealer (as defined in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) for the purposes of marketing stock index futures (or options thereon) to the public.

(g) The Commission shall adopt rules requiring that a contemporaneous written record be made, as practicable, of all orders for execution on the floor or subject to the rules of each contract market placed by a member of the contract market who is present on the floor at the time such order is placed.

(h)(1) Nothing in this Act shall be considered to govern or in any way be applicable to any transaction if—

(A) to the extent that an instrument has elements of a commodity option, the instrument derives less than 50 percent of its value at the date of issuance from the value of the commodity option; and

(B) to the extent that an instrument has elements of a contract of sale of a commodity for future delivery, on the date of issuance, it is expected that less than 50 percent of the change in the value of the instrument or its performance will be due to movement in the price of the commodity or commodities specified in the instrument or in the terms and conditions of the transaction pursuant to which the instrument was issued.

(2) Any transaction in or involving a commodity regulated under this Act not excluded by paragraph (1) shall be subject to regulation by the Commission under section 2(a)(1), 4, or 19, or this section.

* * * * * * *

[FLOOR BROKERS]

[SEC. 4e. It shall be unlawful for any person to act as floor broker in executing any orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless such person shall have registered, under this Act, with the Commission as such floor broker and such registration shall not have expired nor been suspended nor revoked.]

SEC. 4e. UNLAWFUL TO ACT AS FLOOR TRADER OR BROKER WITHOUT REGISTRATION.

It shall be unlawful for any person to act as—

(1) a floor trader in executing purchases and sales; or

(2) a floor broker in executing an order for the purchase or sale of any commodity for future delivery, or involving any contract of sale of any commodity for future delivery, on or subject to the rules of any contract market,

unless such person shall have registered, under this Act, with the Commission as such floor trader or floor broker and such registration shall not have expired nor been suspended nor revoked.

[REGISTRATION OF FUTURES COMMISSION MERCHANTS, INTRODUCING BROKERS, AND FLOOR BROKERS]

SEC. 4f. (a)[(1)] Any person desiring to register as a futures commission merchant, introducing broker, [or floor broker] *floor broker, or floor trader* hereunder shall be registered upon application to the Commission. The application shall be made in such

form and manner as prescribed by the Commission, giving such information and facts as the Commission may deem necessary concerning the business in which the applicant is or will be engaged, including in the case of an application of a futures commission merchant or an introducing broker, the names and addresses of the managers of all branch offices, and the names of such officers and partners, if a partnership, and of such officers, directors, and stockholders, if a corporation, as the Commission may direct. Such person, when registered hereunder, shall likewise continue to report and funish to the Commission the above-mentioned information and such other information pertaining to such person's business as the Commission may require. Each registration shall expire on December 31 of the year for which issued or at such other time, not less than one year from the date of issuance, as the Commission may by rule, regulation, or order prescribe, and shall be renewed upon application therefor unless the registration has been suspended (and the period of such suspension has not expired) or revoked pursuant to the provisions of this Act.

(b)[2] Notwithstanding any other provisions of this Act, no person desiring to register as futures commission merchant or as introducting broker shall be so registered unless he meets such minimum financial requirements as the Commission may by regulation prescribe as necessary to insure his meeting his obligations as a registrant, and each person so registered shall at all times continue to meet such prescribed minimum financial requirements: *Provided,* That such minimum financial requirements will be considered met if the applicant for registration or registrant is a member of a contract market and conforms to minimum financial standards and related reporting requirements set by such contract market in its bylaws, rules, regulations, or resolutions and approved by the Commission as adequate to effectuate the purposes of [this paragraph (2)] this subsection.

(c)(1) As used in this subsection:

(i) The term "affiliated person" means any person directly or indirectly controlling, controlled by, or under common control with a futures commission merchant, as the Commission, by rule or regulation, may determine will effectuate the purposes of this subsection.

(ii) The term "Federal banking agency" shall have the same meaning as the term "appropriate Federal banking agency" in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)).

(2)(A) Each registered futures commission merchant shall obtain such information and make and keep such records as the Commission, by rule or regulation, prescribes concerning the registered futures commission merchant's policies, procedures, or systems for monitoring and controlling financial and operational risks to it resulting from the activities of any of its affiliated persons, other than a natural person.

(B) The records required under subparagraph (A) shall describe, in the aggregate, each of the futures and other financial activities conducted by, and the customary sources of capital and funding of, those of its affiliated persons whose business activities are reasonably likely to have a material impact on the financial or operation-

al condition of the futures commission merchant, including its adjusted net capital, its liquidity, or its ability to conduct or finance its operations.

(C) The Commission, by rule or regulation, may require summary reports of such information to be filed by the futures commission merchant with the Commission no more frequently than quarterly.

(3)(A) If, as a result of adverse market conditions or based on reports provided to the Commission pursuant to paragraph (2) or other available information, the Commission reasonably concludes that the Commission has concerns regarding the financial or operational condition of any registered futures commission merchant, the Commission may require the futures commission merchant to make reports concerning the futures and other financial activities of any of such person's affiliated persons, other than a natural person, whose business activities are reasonably likely to have a material impact on the financial or operational condition of the futures commission merchant.

(B) The Commission, in requiring reports pursuant to this paragraph, shall specify the information required, the period for which it is required, the time and date on which the information must be furnished, and whether the information is to be furnished directly to the Commission or to a contract market or other self-regulatory organization with primary responsibility for examining the registered futures commission merchant's financial and operational condition.

(4) (A) In developing and implementing reporting requirements pursuant to paragraph (2) with respect to affiliated persons subject to examination by or reporting requirements of a Federal banking agency, the Commission shall consult with and consider the views of each such Federal banking agency. If a Federal banking agency comments in writing on a proposed rule of the Commission under this subsection that has been published for comment, the Commission shall respond in writing to the written comment before adopting the proposed rule. The Commission shall, at the request of the Federal banking agency, publish the comment and response in the Federal Register at the time of publishing the adopted rule.

(B) (i) Except as provided in clause (ii), a registered futures commission merchant shall be considered to have complied with a recordkeeping or reporting requirement adopted pursuant to paragraph (2) concerning an affiliated person that is subject to examiniation by, or reporting requirements of, a Federal banking agency if the futures commission merchant utilizes for the recordkeeping or reporting requirement copies of reports filed by the affiliated person with the Federal banking agency pursuant to section 5211 of the Revised Statutes (12 U.S.C. 161), section 9 of the Federal Reserve Act (12 U.S.C. 321 et seq.), section 7(a) of the Federal Deposit Insurance Act (12 U.S.C. 1817(a)), section 10(b) of the Home Owners' Loan Act (12 U.S.C. 1467a(b)), or section 8 of the Bank Holding Company Act of 1956 (12 U.S.C. 1847).

(ii) The Commission may, by rule adopted pursuant to paragraph (2), require any futures commission merchant filing the reports with the Commission to obtain, maintain, or report supplemental information if the Commission makes an explicit finding that the supplemental information is necessary to inform the Commission re-

garding potential risks to the futures commission merchant. Prior to requiring any such supplemental information, the Commission shall first request the Federal banking agency to expand its reporting requirements to include the information.

(5) Prior to making a request pursuant to paragraph (3) for information with respect to an affiliated person that is subject to examination by or reporting requirements of a Federal banking agency, the Commission shall—

(A) notify the agency of the information required with respect to the affiliated person; and

(B) consult with the agency to determine whether the information required is available from the agency and for other purposes, unless the Commission determines that any delay resulting from the consultation would be inconsistent with ensuring the financial and operational condition of the futures commission merchant or the stability or integrity of the futures markets.

(6) Nothing in this subsection shall be construed to permit the Commission to require any futures commission merchant to obtain, maintain, or furnish any examination report of any Federal banking agency or any supervisory recommendations or analysis contained in the report.

(7) No information provided to or obtained by the Commission from any Federal banking agency pursuant to a request under paragraph (5) regarding any affiliated person that is subject to examination by or reporting requirements of a Federal banking agency may be disclosed to any other person (other than as provided in section 8 or section 8a(6)), without the prior written approval of the Federal banking agency.

(8) The Commission shall notify a Federal banking agency of any concerns of the Commission regarding significant financial or operational risks resulting from the activities of any futures commission merchant to any affiliated person thereof that is subject to examination by reporting requirements of the Federal banking agency.

(9) The Commission, by rule, regulation, or order, may exempt any person or class of persons under such terms and conditions and for such periods as the Commission shall provide in the rule, regulation, or order, from the subsection and the rules and regulations issued under this subsection. In granting the exemption, the Commission shall consider, among other factors—

(A) whether information of the type required under this subsection is available from a supervisory agency (as defined in section 1101(7) of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401(7))), a State insurance commission or similar State agency, the Securities and Exchange Commission, or a similar foreign regulator;

(B) the primary business of any affiliated person;

(C) the nature and extent of domestic or foreign regulation of the affiliated person's activities;

(D) the nature and extent of the registered futures commission merchant's commodity futures and options activities; and

(E) with respect to the registered futures commission merchant and its affiliated persons, on a consolidated basis, the

amount and proportion of assets devoted to, and revenues derived from activities in the United States futures markets.

(10) Information required to be provided pursuant to this subsection shall be subject to section 8. Except as specifically provided in section 8 and notwithstanding any other provision of law, the Commission shall not be compelled to disclose any information required to be reported under this subsection, or any information supplied to the Commission by any domestic or foreign regulatory agency that relates to the financial or operational condition of any affiliated person of a registered futures commission merchant.

(11) Nothing in paragraphs (1) through (10) shall be construed to supersede or to limit in any way the authority or powers of the Commission pursuant to any other provision of this Act or regulations issued under this Act.

[REPORTING AND RECORDKEEPING]

SEC. 4g. (1) Every person registered hereunder as futures commission merchant, introducing broker, [or floor broker] *floor broker, or floor trader* shall make such reports as are required by the Commission regarding the transactions and positions of such person, and the transactions and positions of the customer thereof, in commodities for future delivery on any board of trade in the United States or elsewhere; shall keep books and records pertaining to such transactions and positions in such form and manner and for such period as may be required by the Commission; and shall keep such books and records open to inspection by any representative of Commission or the United States Department of Justice.

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[TRADES AND EXECUTIONS BY FLOOR BROKERS]

SEC. 4j. (1) The Commission shall within nine months after the effective date of the Commodity Futures Trading Commission Act of 1974, and subsequently when it determines that changes are required, make a determination, after notice and opportunity for hearing, whether or not a floor broker may trade for his own account or any account in which such broker has trading discretion, and also execute a customer's order for future delivery and, if the Commission determines that such trades and such executions shall be permitted, the Commission shall further determine the terms, conditions, and circumstances under which such trades and such executions shall be conducted: *Provided,* That any such determination shall, at a minimum, take into account the effect upon the liquidity of trading of each market: *And provided further,* That nothing herein shall be construed to prohibit the Commission from making separate determinations for different contract markets when such are warranted in the judgment of the Commission, or to prohibit contract markets from setting terms and conditions more restrictive than those set by the Commission.

(2) The Commission shall within nine months after the effective date of the Commodity Futures Trading Commission Act of 1974, and subsequently when it determines that changes are required, make a determination, after notice and opportunity for hearing, whether or not a futures commission merchant may trade for its

own account or any proprietary account, as defined by the Commission, and if the Commission determines that such trades shall be permitted, the Commission shall further determine the terms, conditions, and circumstances under which such trades shall be conducted: *Provided,* That any such determination, at a minimum, shall take into account the effect upon the liquidity of trading of each market: *And provided further,* That nothing herein shall be construed to prohibit the Commission from making separate determinations for different contract markets when such are warranted in the judgment of the Commission, or to prohibit contract markets from setting terms and conditions more restrictive than those set by the Commission.

(3)(A) Except as provided in subparagraph (B), a floor broker may not execute an order or a customer if such floor broker knows the opposite party to the transaction to be a floor broker or floor trader with whom such trader or broker has a relationship involving trading on such contract market as—

(i) a partner in a partnership;

(ii) an employer or employee; or

(iii) such other affiliation as the Commission may specify by rule.

(B) Subparagraph (A) shall not apply—

(i) if the Commission has adopted rules that the Commission certifies to Congress require procedures and standards designed to prevent violations of this Act attributable to the trading described in subparagraph (A); or

(ii) to any contract market that has implemented rules designed to prevent violations of this Act attributable to the trading described in subparagraph (A), except that, if the Commission determines, by rule or order, that such rules are not adequate to prevent such violations, subparagraph (A) shall become effective with respect to such contract market after a reasonable period determined by the Commission.

* * * * * * *

[STANDARDS AND EXAMINATIONS]

SEC. 4p. *(a)* The Commission may specify by rules and regulations appropriate standards with respect to training, experience, and such other qualifications as the Commission finds necessary or desirable to insure the fitness of persons required to be registered with the Commission. In connection therewith, the Commission may prescribe by rules and regulations the adoption of written proficiency examinations to be given to applicants for registration and the establishment of reasonable fees to be charged to such applicants to cover the administration of such examinations. The Commission may further prescribe by rules and regulations that, in lieu of examinations administered by the Commission, futures associations registered under section 17 of this Act or contract markets may adopt written proficiency examinations to be given to applicants for registration and charge reasonable fees to such applicants to cover the administration of such examinations. Nothwithstanding any other provision of this section, the Commission may specify by rules and regulations such terms and conditions as it deems ap-

propriate to protect the public interest wherein exception to any written proficiency examination shall be made with respect to individuals who have demonstrated, through training and experience, the degree of proficiency and skill necessary to protect the interests of customers, clients, pool participants, or other members of the public with whom such individuals deal.

(b) The Commission shall issue regulations to require new registrants, within 6 months after receiving such registration, to attend a training session, and all other registrants to attend periodic training sessions, to ensure that registrants understand their responsibilities to the public under this Act, including responsibilities to observe just and equitable principles of trade, any rule or regulation of the Commission, any rule of any appropriate contract market, registered furtures association, or other self-regulatory organization, or any other applicable Federal or State law, rule, or regulation.

* * * * * * *

[DUTIES OF CONTRACT MARKETS]

SEC. 5a (a) Each contract market shall—

(1) * * *

(2) * * *

* * * * * * *

(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, that (i) have been approved by the Commission pursuant to [paragraph (12) of this section] *paragraph (12) of this subsection,* (ii) have become effective under such paragraph, or (iii) must be enforced pursuant to any Commission rule, regulation, or order; and revoke and not enforce any bylaw, rule regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, that has been disapproved by the Commission;

(9) enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Commission;

(10) permit the delivery of any commodity, or contracts of sale thereof for future delivery, of such grade or grades, at such point or points and at such quality and locational price differentials as will tend to prevent or diminish price manipulation, market congestion, or the abnormal movement of such commodity in interstate commerce. If the Commission after investigation finds that the rules and regulations adopted by a contract market permitting delivery of any commodity on contracts of sale thereof for future delivery, do not accomplish the objectives of this subsection, then the Commission shall notify the contract market of its finding and afford the contract market an opportunity to make appropriate changes in such rules and regulations. If the contract market within seventy-five days of such notification fails to make the changes which in the opinion of the Commission are necessary to accomplish the objectives of this subsection, then the Commission

after granting the contract market an opportunity to be heard, may change or supplement such rules and regulations of the contract market to achieve the above objectives: *Provided,* That any order issued under this paragraph shall not apply to contracts of sale for future delivery in any months in which contracts are currently outstanding and open: *And provided further,* That no requirement for an additional delivery point or points shall be promulgated following hearings until the contract market affected has had notice and opportunity to file exceptions to the proposed order determining the location and number of such delivery point or points;

(11) provide a fair and equitable procedure through arbitration or otherwise (such as by delegation to registered futures association having rules providing for such procedures) for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That [i] *(A)* the use of such procedure by a customer shall be [voluntary and (ii)] *voluntary, (13)* the term "customer" as used in this paragraph shall not include another member of the contract market, *and (C)* in the case of a claim arising from a violation in the execution of an order on the floor of a contract market, such procedure shall provide, to the extent appropriate—

(i) for payment of actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so; and

(ii) where the violation is willful and intentional, for payment to the customer of punitive or exemplary damages, in addition to losses proximately caused by the violation, in an amount equal to no more than two times the amount of such losses. If punitive or exemplary damages are awarded against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of such order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy the award of punitive or exemplary damages if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation.

(12) except as otherwise provided in this paragraph, submit to the Commission for its prior approval all bylaws, rules, regulations, and resolutions ("rules") made or issued by such contract market, or by the governing board thereof or any committee thereof, that relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market, as such terms and conditions are defined by the Commission by rule or regulation, except those rules relating to the setting of levels or margin. Each contract market shall submit to the Commission all other rules

(except those relating to the setting of levels of margin and except those that the Commission may specify by regulation) and may make such rules effective ten days after receipt of such submission by the Commission unless, within the ten-day period, the contract market requests review and approval thereof by the Commission or the Commission notifies such contract market in writing of its determination to review such rules for approval. The determination to review such rules for approval shall not be delegable to any employee of the Commission. At least thirty days before approving any rules of major economic significance, as determined by the Commission, the Commission shall publish a notice of such rules in the Federal Register. The Commission shall give interested persons an opportunity to participate in the approval process through the submission of written data, views, or arguments. The determination by the Commission whether any such rules are of major economic significance shall be final and not subject to judicial review. The Commission shall approve such rules if such rules are determined by the Commission not to be in violation of this Act or the regulations of the Commission and the Commission shall disapprove, after appropriate notice and opportunity for hearing, any such rule which the Commission determines at any time to be in violation of the provisions of this Act or the regulations of the Commission. If the Commission institutes proceedings to determine whether a rule should be disapproved pursuant to this paragraph, it shall provide the contract market with written notice of the proposed grounds for disapproval, including the specific sections of this Act or the Commission's regulations which would be violated. At the conclusion of such proceedings, the Commission shall approve or disapprove such rule. Any disapproval shall specify the sections of this Act or the Commission's regulations which the Commission determines such rule has violated or, if effective, would violate. If the Commission does not approve or institute disapproval proceedings with respect to any rule within one hundred and eighty days after receipt or within such longer period as the contract market may agree to, or if the Commission does not conclude a disapproval proceeding with respect to any rule within one year after receipt or within such longer period as the contract market may agree to, such rule may be made effective by the contract market until such time as the Commission disapproves such rule in accordance with this paragraph. The Commission shall specify the terms and conditions under which a contract market may, in an emergency as defined by the Commission, make a rule effective on a temporary basis without prior Commission approval, or without compliance with the ten-day notice requirement under this paragraph, or during any period of review by the Commission. In the event of such an emergency, as defined by the Commission, requiring immediate action, the contract market by a two-thirds vote of its governing board may immediately make effective a temporary rule dealing with such emergency if the contract market notifies the Commission of such action with a complete explanation of the emergency involved **[**.**]**; *and*

(13) provide for disclosure to the exchange and the Commission of any trade, business, or financial partnership, cost-, profit-, or capital-sharing agreement, or other formal arrangement among or be-

tween floor brokers and traders on such contract market where such partnership agreement or arrangement is material and known to the floor broker or floor trader;

(14)(A) provide for meaningful representation on the governing board of the contract market's board of trade of a diversity of interests, including—

(i) futures commission merchants;

(ii) producers of, and consumers, processors, distributors, or merchandisers of, principal commodities traded on the exchange;

(iii) floor brokers and traders; and

(iv) participants in a variety of pits or principal groups of commodities traded on the exchange.

(B) provide that no less than 20 percent of the members of such board be comprised of nonmembers of such contract market's board of trade with—

(i) expertise in futures trading, or the regulation thereof, or in commodities traded through contracts on the exchange; or

(ii) other eminent qualifications making such person capable of participating in and contributing to board deliberations.

(C) provide that no less than 10 percent of the members of such board be comprised where applicable of farmers, producers, merchants, or exporters of principal commodities traded on the exchange;

(15)(A) provide on all major disciplinary committees for a diversity of membership sufficient to ensure fairness and to prevent special treatment or preference for any person in the conduct of disciplinary proceedings and the assessment of penalties.

(B) A major disciplinary committee hearing a disciplinary matter shall include—

(i) qualified persons representing segments of the exchange membership other than that of the subject of the proceeding; and

(ii) where appropriate to carry out the purposes of this paragraph, qualified persons who are not members of the exchange.

(C) If a contract market takes final disciplinary action against a member for a violation that involves the execution of a customer transaction and results in financial harm to such customer, the contract market shall promptly inform the futures commission merchant identified on the records of such contract market as having cleared such transaction, and such futures commission merchant shall promptly inform the person identified on its records as the owner of the account for which such transaction was executed, of the disciplinary action and the principal facts thereof;

(16)(A) provide for the avoidance of conflict of interest in all deliberations by the governing board and any disciplinary and oversight committees.

(B) In order to comply with subparagraph (A), each contract market shall adopt rules and procedures to require, at a minimum, that any member of a governing board or a disciplinary or oversight committee must abstain from participation in confidential deliberations and voting on any matter where the named party in interest is the member, the member's employer, the member's employee, or any

other person that has a business or employment relationship with the member that warrants abstention by such member.

(C) Notwithstanding any other provision of this paragraph, in considering whether the contract market should take any significant action that would not be submitted to the Commission for its prior approval, including the adoption of any nonphysical emergency rule (but excluding any rule not submitted for prior Commission approval because such rule is unrelated to terms and conditions of any contract traded on such contract market), the contract market shall adopt appropriate rules and regulations to ensure that—

(i) any party with access to material, nonpublic information about such deliberations gained through the position of the party as an exchange employee or official shall be prevented from—

(I) trading, directly or indirectly, in a manner to take improper advantage of such information; or

(II) transmitting such information to any other party, except as necessary for the performance of official duties; and

(ii) prior to such deliberations, the governing board or disciplinary or oversight committee, acting directly or through an authorized member or contract market official, shall (after review of the positions of the members of such board or committee, and positions at the firms with which such members are affiliated, including customer positions, in the futures or option contract that is the subject of the matter before the board or committee) consider whether any member of the board or committee must abstain from participating in the matter before the board or committee due to positions of such member, or positions, including customer positions, held at any firm with which such member is affiliated, in the futures or option contract that is the subject of matter before the board or committee.

(D) If any board or committee considers whether to direct any member to abstain from participation in any matter before the board or committee, the minutes of such deliberations shall clearly reflect this fact; and

(17) provide that no member found by the Commission, a contract market, a registered futures association, or a court of competent jurisdiction to have committed any violation of this Act or any other provision of law that would reflect on the fitness of the member may serve on any contract market oversight or disciplinary panel for an appropriate period (as defined by Commission rule).

(b)(1) Each contract market shall maintain and utilize a system to monitor trading to detect and deter violations of the contract market's rules and regulations committed in the making of trades and the execution of customer orders on the floor or subject to the rules of such contract market. The system shall include—

(A) physical observation of trading areas;

(B) audit trail and record keeping systems able to capture essential data on the terms, participants, and sequence of transactions (including relevant data on unmatched trades and outtrades);

(C) systems capable of and used to review data on trades effectively on a regular basis to detect violations committed in

making trades and executing customer orders on the floor or subject to the rules of such contract market, including—

(i) all types of violations attributable to dual trading; and

(ii) to the full extend feasible as determined by the Commission, all other types of violations involving the making of trades and the execution of customer orders;

(D) the use of information gathered through such system on a consistent basis to bring appropriate disciplinary actions against violators;

(E) the commitment of resources to such system necessary for such system to be effective in detecting and deterring such violations, including adequate staff to develop and prosecute disciplinary actions; and

(F) the assessment of meaningful penalties against violators and the referral of appropriate cases to the Commission.

(2) The audit trail system of the contract market shall accurately record—

(A) the times of trades in increments of no more than 1 minute in length; and

(B) the sequence of trades for each floor trader and broker, consistent with Commission regulations.

(3) Beginning 3 years after the date of enactment of this subsection, the audit trail system of the contract market shall—

(A) for all trades, record accurately and promptly the essential data on terms, participants, and times as required by the Commission by rule, including the time of execution of such trade, through a means that—

(i) records such data in a form which cannot be altered except in a manner that will leave a complete and independent record of such alteration;

(ii) continually provides such data to the contract market;

(iii) identifies such time, to the extent practicable as determined by the Commission—

(I) independently of the person making the trade;

(II) through a mechanism that records the time automatically when entered by the person making the trade; or

(III) through such other means that will capture a similarly reliable time; and

(iv) is adequately precise to determine, to the extent practicable as determined by the Commission by rule or order—

(I) the sequence of all trades by each floor trader; and

(II) the sequence of all trades by each floor broker; and

(B) to the extent practicable as determined by the Commission by rule or order, for customer trades, record the time that each order is received on the floor of the board of trade, is received by the floor broker for execution (or when such order is transmitted in an extremely rapid manner to the broker), and is reported from the floor of the board of trade as executed, through a means that—

(i) records such times in a form which cannot be altered except in a manner that will leave a complete and independent record of such alteration;

(ii) continually provides such data to the contract market;

(iii) identifies such time—

"(I) independently of the person making the trade or processing the order;

(II) through a mechanism that records the time automatically when entered by the person making the trade or processing such order, as appropriate; or

(III) through such other means as will capture a similarly reliable time; and

(iv) is adequately precise to determine—

(I) the sequence in which, for each futures commission merchant, floor broker, or member firm, as applicable, all orders are received on and reported from the floor of the contract market; and

(II) the sequence in which orders are received by each floor broker for execution.

(4) The Commission may, by rule, establish standards under which the audit trail systems required under paragraph (3) shall record, to the extent practicable—

(A) the sequence of all trades made by all floor traders and floor brokers; and

(B) the interval between the time of receipt and the time of execution of each order by the floor broker.

(5) The Commission shall, by rule or order, make exemptions to the extent appropriate from the requirements of paragraph (3)—

(A) for an exchange with respect to which the Commission finds that—

(i) the volume of trading of such exchange is relatively small and the exchange has demonstrated substantial compliance with the objectives of such paragraph; and

(ii) the trade monitoring system at such exchange otherwise maintains a high level of compliance with this subsection; and

(B) for categories of customer order with respect to which the Commission finds that such orders are transmitted to and reported from the trading pit in an extremely rapid manner such that substantial compliance with the objectives of paragraph (3) can be otherwise achieved.

(6) Any rule or other adopted by the Commission under paragraphs (4) and (5) shall become effective 30 legislative days or 90 calendar days, whichever is later, after submission of such rule or order to Congress.

* * * * * * *

[EXCLUSION OF PERSONS FROM PRIVILEGE OF "CONTRACT MARKETS"; ENFORCEMENT POWERS OF COMMISSION]

SEC. 6(b) If the Commission has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the

market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Commission under this Act, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, it may serve upon such person a complaint stating its charges in that respect, which complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any contract market, and directing that all contract markets refuse all trading privileges to such person, until further notice of the Commission and to show cause why the registration of such person, if registered with the Commission in any capacity, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, elsewhere, before the Commission or before an Administrative Law Judge designated by the Commission, which Administrative Law Judge shall cause all evidence to be reduced to writing and forthwith transmit the same to the Commission. For the purpose of securing effective enforcement of the provisions of this [Act and] *Act*, for the purpose of any investigation or proceeding under this [Act,] *Act, and for the purpose of any action taken under section 12(f),* any member of the Commission or any Administrative Law Judge or other officer designated by the Commission (except as provided in the fifth sentence of this subsection) may administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry. The attendance of witnesses and the production of any such records may be required from any place in the United States, any State or any foreign country or jurisdiction at any designated place of hearing. A subpena issued under this section may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service of process in a foreign country, except that a subpena to be served on a person who is not to be found within the territorial jurisdiction of any court of the United States may be issued only on the prior approval of the Commission. In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance of testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investiga-

tion or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district wherein such person is an inhabitant or transacts business or wherever such person may be found. Upon evidence received, the Commission may *(1)* prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, [and, if] *(2)* if such person is registered with the Commission in any capacity, [may suspend] *suspend* for a period not to exceed six months, or revoke, the registration of such person, [and may] *(3)* assess such person a civil penalty of not more than [$100,000] *the higher of $100,000 or triple the monetary gain to such person* for each such violation. Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the Commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States circuit court of appeals of the circuit in which the petitioner is doing business, or in the case of an order denying registration, the circuit in which the petitioner's principal place of business listed on petitioner's application for registration is located, a written petition, within fifteen days after the notice of such order is given to the offending person, praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and thereupon the Commission shall file in the court the record theretofore made, as provided in section 2112 of title 28, United States Code. Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the findings of the Commission as to the facts, if supported by the weight of evidence, shall in like manner be conclusive *and (4) require restitution to customers of damages proximately caused by violations of such persons.*

[MANIPULATIONS OR OTHER VIOLATIONS]

SEC. 6(c) If any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or otherwise is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing, and subject to appeal as in other cases provided for in paragraph (b) of this section, make and enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such poerson shall be guilty of a misdeameanor and, upon conviction thereof, shall be fined not more than [$100,000], *the higher of $100,000 or triple the monetary gain to such person* or imprisoned for not less than

six months nor more than one year, or both, except that if such failure or refusal to obey or comply with such order involves any offense within paragraph (a) or (b) of section 9 of this Act, such person shall be guilty of a felony and, upon conviction thereof, shall be subject to the penalties of said paragraph 9(a) or 9(b): *Provided,* That any such cease and desist order against any respondent in any case of manipulation of, or attempt to manipulate, the price of any commodity shall be issued only in conjunction with an order issued against such respondent under section 6(b) of this Act. Each day during which such failure or refusal to obey or comply with such order continues shall be deemed a separate offense.

[ASSESSMENT OF MONEY PENALTIES]

SEC. 6(d) [In determining the amount of the money penalty assessed under paragraph (b) of this section, the Commission shall consider, in the case of a person whose primary business involves the use of the commodity futures market—the appropriateness of such penalty to the size of the business of the person charged, the extent of such person's ability to continue in business, and the gravity of the violation; and in the case of a person whose primary business does not involve the use of the commodity futures market—the appropriateness of such penalty to the net worth of the person charged, and the gravity of the violation. If the offending person upon whom such penalty is imposed, after the lapse of the period allowed for appeal or after the affirmance of such penalty, shall fail to pay such penalty the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.]

(d)(1) In determining the amount of the money penalty assessed under subsection (b), the Commission shall consider the appropriateness of such penalty to the gravity of the violation.

(2)(A) Except as provided in subparagraphs (B) and (C), if a money penalty is assessed against a person under subsection (b), such person shall beginning 15 days after such assessment—

(i) be prohibited automatically from trading on all contract markets; and

(ii) if the person is registerd with the Commission, be suspended automatically,

until such person shows to the satisfaction of the Commission that payment of such amount, with interest on such payment to the date of payment, has been made.

(B) Subparagraph (A) shall not apply if the person on whom the penalty is assessed shows to the satisfaction of the Commission, within 15 days from the expiration of the period alowed for payment of such penalty, that—

(i) an appeal as authorized by subseciton (b) has been taken; or

(ii) payments of the full amount of the penalty then due has been made.

(C) If on appeal the Commission prevails or if the appeal is dismissed, the automatic prohibition against trading and suspension of registration imposed under subparagraph (A) shall become effective

on the expiration of 30 days from the date of judgment on the appeal.

(3) If the person on whom a money penalty is imposed under subsection (b) fails to pay such penalty after the lapse of the period allowed for appeal or after the affirmance of such penalty, the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

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[NONENFORCEMENT OF RULES OF GOVERNMENT OR OTHER VIOLATIONS]

SEC. 6b. If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 5 of this Act, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this Act or any of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing on the record and subject to appeal as in other cases provided for in paragraph (a) of section 6 of this Act, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, and assess a civil penalty of not more than [$100,000] *$500,000* for each such violation. If such contract market, director, officer, agent, or employee, after the entry of such a cease and desist order and the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of an misdeameanor and, upon conviction thereof, shall be fined not more than [$100,000] *$500,000* or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such cease and desist order continues shall be deemed a separate offense. If the offending contract market or other person upon whom such penalty is imposed, after the lapse of the period allowed for appeal or after the affirmance of such penalty, shall fail to pay such penalty, the Commission shall refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court. In determining the amount of the money penalty assessed under this section, the Commission shall consider [the appropriateness of such penalty to the net worth of the offending person and] the gravity of the offense, and in the case of a contract market shall further consider whether the amount of the penalty will materially impair the contract market's ability to carry on its operations and duties.

[ACTION TO ENJOIN OR RESTRAIN VIOLATIONS]

SEC. 6c. *(a)* Whenever it shall appear to the Commission that any contract market or other person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order thereunder, or is restraining trading in any commodity for future delivery, the Commission may bring an action in the proper district court of

the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such act or practice, or to enforce compliance with this Act, or any rule, regulation or other thereunder, and said courts shall have jurisdiction to entertain such actions: *Provided,* That no restraining order (other than a restraining order which prohibits any person from destroying, altering or disposing of, or refusing to permit authorized representatives of the Commission to inspect, when and as requested, any books and records or other documents or which prohibits any person from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets, or other property, and other than an order appointing a temporary receiver to administer such restraining order and to perform such other duties as the court may consider appropriate) or injunction for violation of the provisions of this Act shall be issued ex parte by said court. *(b)* Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond. *(c)* Upon application of the Commission, the district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding any person to comply with the provisions of this Act or any rule, regulation, or order of the Commission thereunder, including the requirement that such person take action as is necessary to remove the danger of violation of this Act or any such rule, regulation, or order: *Provided,* That no such writ of mandamus, or order affording like relief, shall be issued ex parte.

(d)(1) In any action brought under this section, the Commission may seek and the court shall have jurisdiction to impose, on a proper showing, on any person found in the action to have committed any violation a civil penalty in the amount of not more than the higher of $100,000 or triple the monetary gain to the person for each violation.

(2) If a person on whom such a penalty is imposed fails to pay the penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover the penalty by action in the appropriate United States district court.

(e) Any action under this section may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or in the district where the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

(f) In lieu of bringing actions itself pursuant to this section, the Commission may request the Attorney General to bring the action.

(g) Where the Commission elects to bring the action, it shall inform the Attorney General of such suit and advise him of subsequent developments.

[JURISDICTION OF STATES]

SEC. 6d. (1) Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a State may designate, that the interests of

the residents of that State have been, are being, or may be threatened or adversely affected because any person (other than a contract market, clearinghouse, [or floor broker] *floor broker, or floor trader*) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this Act or any rule, regulation, or order of the Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this Act, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate.

(2) The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia, shall have jurisdiction of all suits in equity and actions at law brought under this section to enforce any liability or duty created by the Act or any rule, regulation, or order of the Commission thereunder, or to obtain damages or other relief with respect thereto. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this Act, or any rule, regulation, or order of the Commission thereunder, including the requirement that the defendant take such action as is necessary to remove the danger of violation of this Act or of any such rule, regulation, or order. Upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Immediately upon instituting any such suit or action, the State shall serve written notice thereof upon the Commission and provide the Commission with a copy of its complaint, and the Commission shall have the right to (A) intervene in the suit or action and, upon doing so, shall be heard on all matters arising therein, and (B) file petitions for appeal.

(4) Any suit or action brought under this section in a district court of the United States may be brought in the district wherein the defendent is found or is an inhabitant or transacts business or wherein the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

(5) For purposes of bringing any suit or action under this section, nothing in this Act shall prevent the attorney general, the administrator of the State securities laws, or other duly authorized State officials from exercising the powers conferred on them by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) For purposes of this section "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(7) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal antifraud statute of such State.

(8)(A) Nothing in this Act shall prohibit an authorized State official from proceeding in a State court against any person registered under this Act (other than a floor broker, *floor trader*, or registered futures association) for an alleged violation of any antifraud provision of this Act or any antifraud rule, regulation, or order issued pursuant to the Act.

(B) The State shall give the Commission prior written notice of its intent to proceed before instituting a proceeding in State court as described in this subsection and shall furnish the Commission with a copy of its complaint immediately upon instituting any such proceeding. The Commission shall have the right to (i) intervene in the proceeding and, upon doing so, shall be heard on all matters arising therein, and (ii) file a petition for appeal. The Commission or the defendant may remove such proceeding to the district court of the United States for the proper district by following the procedure for removal otherwise provided by law, except that the petition for removal shall be filed within sixty days after service of the summons and complaint upon the defendant. The Commission shall have the right to appear as amicus curiae in any such proceeding.

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[PUBLIC DISCLOSURE]

SEC. 8. (a)*(1)* For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the Commission may make such investigations as it deems necessary to ascertain the facts regarding the operations of boards of trade and other persons subject to the provsions of this Act. *(2)* The Commission may publish from time to time the results of any such investigation and such general statistical information gathered therefrom as it deems of interest to the public: *Provided*, That except as otherwise specifically authorized in this Act, the Commission may not publish data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers: *Provided further*, That the Commission may withhold from public disclosure any data or information concerning or obtained in connection with any pending investigation of any person.

(3)(A) Notwithstanding sections 2(a)(7) and 9(d) of this Act, section 5945 of title 5, United States Code, sections 1341, 3302(b), and 9102 of title 31 of such Code, and sections 254 and 255 of title 41 of such Code, the Commission may, be order, authorize specified employees to conduct undercover investigations where the Commission has reason to believe that violations of this Act may have occurred, may be occurring, or may be about to occur to ascertain whether proceeding under this Act with respect to such violations are appropriate.

(B) The Commission shall notify the Attorney General before initiating an investigation under this paragraph and other Federal or State law enforcement officials as appropriate. The Commission shall not adopt an order under subparagraph (A) unless the Commission has first made a request to the Attorney General that the Attorney General conduct the proposed undercover investigation and

the Attorney General has declined to do so in a reasonable time period as determined by the Commission.

(C) In conducting such investigations, the Commission may coordinate with and seek the assistance of other Federal or State law enforcement authorities, contract markets, registrants, or other private parties as the Commission considers appropriate.

(D) During the conduct of an investigation under this paragraph, the employees conducting such investigation shall report to the Chairman of the Commission no less than once every 90 days on the progress of such investigation.

(E) A Commission employee who participates in a violation of this Act in the course and as a necessary element of an undercover investigation authorized under this paragraph shall not be liable in any action or proceeding arising from such violation.

(F) The Commission shall by rule adopt procedures governing the conduct of such investigations that are similar to guidelines adopted by the Attorney General for the conduct of undercover investigations.

(b) The Commission may disclose publicly any data or information that would separately disclose the market positions, business transactions, trade secrets, or names of customers of any person when such disclosure is made in connection with a congressional proceeding, in an administrative or judicial proceeding brought under this Act, in any receivership proceeding involving a receiver appointed in a judicial proceeding brought under this Act, or in any bankruptcy proceeding in which the Commission has intervened or in which the Commission has the right to appear and be heard under title II of the United States Code. *Nothing in this subsection shall apply to the disclosure of data or information obtained by the Commission from a foreign futures authority.*

(c) The Commission may make or issue such reports as it deems necessary, or such opinions or orders as may be required under other provisions of law, relative to the conduct of any board of trade or to the transactions of any person found guilty of violating the provisions of this Act or the rules, regulations, or orders of the Commission thereunder in proceedings brought under section 6 of this Act. In any such report or opinion, the Commission may set forth the facts as to any actual transaction or any information referred to in subsection (b) of this section, if such facts or information have previously been disclosed publicly in connection with a congressional proceeding, or in an administrative or judicial proceeding brought under this Act.

(d) The Commission, upon its own initiative or in cooperation with existing governmental agencies, shall investigate the marketing conditions of commodities and commodity products and byproducts, including supply and demand for these commodities, cost to the consumer, and handling and transportation charges. It shall also compile and furnish to producers, consumers, and distributors, by means of regular or special reports, or by such other methods as it deems most effective, information respecting the commodity markets, together with information on supply, demand, prices, and other conditions in this and other countries that affect the markets.

(e) The Commission may disclose and make public, where such information has previously been disclosed publicly in accordance with the provisions of this section, the names and addresses of all traders on the boards of trade on the commodity markets with respect to whom the Commission has information, and any other information in the possession of the Commission relating to the amount of commodities purchased or sold by each such trader. Upon the request of any committee of either House of Congress, acting within the scope of its jurisdiction, the Commission shall furnish to such committee the names and addresses of all traders on such boards of trade with respect to whom the Commission has information, and any other information in the possession of the Commission relating to the amount of any commodity, purchased or sold by each such trader. Upon the request of any department or agency of the Government of the United States, acting within the scope of its jurisdiction, the Commission may furnish to such department or agency any information in the possession of the Commission obtained in connection with the administration of this Act. However, any information furnished under this subsection to any Federal department or agency shall not be disclosed by such department or agency except in any action or proceeding under the laws of the United States to which it, the Commission, or the United States is a party. Upon the request of any department or agency of any State or any political subdivision thereof, acting within the scope of its jurisdiction, *any foreign futures authority,* or any department or agency of any foreign government of any political subdivision thereof, acting within the scope of its jurisdiction, the Commission may furnish to such *foreign futures authority,* department or agency any information in the possession of the Commission obtained in connection with the administration of this Act. Any information furnished to any department or agency of any State or political subdivision thereof shall not be disclosed by such department or agency except in connection with an adjudicatory action or proceeding brought under this Act or the laws of such State or political subdivision to which such State or political subdivision or any department or agency thereof is a party. The Commission shall not furnish any information to a *foreign futures authority or to a* department or agency of a foreign government or political subdivision thereof unless the Commission is satisfied that the information will not be disclosed by such *foreign futures authority,* department or agency except in connection with an adjudicatory action or proceeding brought under the laws of such foreign government or political subdivision to which such foreign government or political subdivision or any department or agency thereof *or foreign futures authority* is a party.

(f) The Commission shall disclose information in its possession pursuant to a subpena or summons only if—

(1) a copy of the subpena or summons has been mailed to the last known home or business address of the person who submitted the information that is the subject of the subpena or summons, if the address is known to the Commission, or, if such mailing would be unduly burdensome, the Commission provides other appropriate notice of the subpena or summons to such person, and

(2) at least fourteen days have expired from the date of such mailing of the subpena or summons, or such other notice.

This subsection shall not apply to congressional subpenas or congressional requests for information.

(g) The Commission shall provide any registration information maintained by the Commission on any registrant upon reasonable request made by any department or agency of any State or any political subdivision thereof. Whenever the Commission determines that such information may be appropriate for use by any department or agency of a State or political subdivision thereof, the Commission shall provide such information without request.

(h) The Commission shall submit to Congress a written report within one hundred and twenty days after the end of each fiscal year detailing the operations of the Commission during such fiscal year. The Commission shall include in such report such information, data, and legislative recommendations as it deems advisable with respect to the administration of this Act and its powers and functions under this Act.

(i)*(1)* The Comptroller General of the United States shall conduct reviews and audits of the Commission and make reports theron. For the purpose of conducting such reviews and audits, the Comptroller General shall be furnished such information regarding the powers, duties, organizations transactions, operations, and activities of the Commission as the Comptroller General may require and the Comptroller General and the duly authorized representatives of the Comptroller General shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of the Commission [except that in reports the Comptroller General shall not include data and information that would separately disclose the business transactions of any person and trade secrets or names of customers, although such data shall be provided upon request by any committee of either House of Congress acting within the scope of its jurisdiction.].

(2) For the purpose of conducting reviews and audits under paragraph (1), the Comptroller General and any duly authorized representative shall, under the terms and conditions applicable to the Commission, have access to and the right to examine all records and other recorded information, in any form, except such records that relate to open position data, unless pursuant to a request of the Committee on Agriculture of the House of Representatives or the Committee on Agriculture, Nutrition, and Forestry of the Senate, and to examine any property that is within the possession and control of any contract market, clearinghouse, or registered futures association within the jurisdiction of the Commission.

(3) The Comptroller General shall maintain the same level of confidentiality for information made available under this paragraph as the Commission. Officers and employees of the General Accounting Office shall be subject to the same statutory penalties for unauthorized disclosure or use as officers and employees of the Commission.

(4) The Comptroller General shall not include in reports data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of cus-

tomers, although such data shall be provided on request by any committee of either House of Congress acting within the scope of its jurisdiction.

(5) The Comptroller General's right of access under this section shall be enforceable pursuant to section 716 of title 31, United States Code.

[REGISTRATION OF COMMODITY DEALERS AND ASSOCIATED PERSONS]

SEC. 8a. The Commission is authorized—

(1) to register futures commission merchants, associated persons of futures commission merchants, introducing brokers, associated persons of introducing brokers, commodity trading advisors, associated persons of commodity trading advisors, commodity pool operators, associated persons of commodity pool operators, [and floor brokers] *floor brokers, and floor traders* upon application in accordance with rules and regulations and in the form and manner to be precribed by the Commission, which may require the applicant, and such persons associated with the applicant as the Commission may specify, to be fingerprinted and to submit, or cause to be submitted, such fingerprints to the Attorney General for identification and appropriate processing, and in connection therewith to fix and establish from time to time reasonable fees and charges for registrations and renewals thereof: *Provided,* That notwithstanding any provision of this Act, the Commission may grant a temporary license to any applicant for registration with the Commisison pursuant to such rules, regulations, or orders as the Commission may adopt, except that the term of any such temporary license shall not exceed six months form the date of its issuance;

(2)upon notice, but without a hearing and pursuant to such rules, regulations, or orders as the Commisison may adopt, to refuse to register, to register conditionally, or to suspend or place restrictions upon the registration of, any person and with such a hearing as may be appropriate to revoke the registration of any person—

(A) if a prior registration of such person in any capacity has been suspended (and the period of such suspension has not expired) or has been revoked;

(B) if registration of such person in any capacity has been refused under the provisions of paragraph (3) of this section within five years proceding the the filing of the application for registration or at any time thereafter;

(C) if such person is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction (except that registration may not be revoked solely on the basis of such temporary order, judgment, or decree), including an order entered pursuant to an agreement of settlement to which the Commission or any Federal or State agency or other governmental body is a party, from (i) acting as a futures commission merchant, introducing broker, floor broker, *floor trader,* commodity trading advisor, commodity pool operator, associated

person of any registrant under this Act, securities broker, securities dealer, municipal securities broker, municipal securities dealer, transfer agent, clearing agency, securities information processor, investment adviser, investment company, or affiliated person or employee of any of the foregoing or [(ii) engaging in or continuing any activity involving any transaction in or advise concerning contracts of sale of a commodity for future delivery, concerning matters subject to Commision regulation under section 4c or 19 of this Act, or concerning securities]; *(ii) engaging in or continuing any activity where such activity involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretense, bribery, gambling, or any transaction in or advice concerning contracts of sale of commodity for future delivery, concerning matters subject to Commission regulations under section 4c or 19, or concerning securities.*

(D) if such person has been convicted within ten years preceding the filing of the application for registration or at any time thereafter of any felony that (i) involves any transactions or advice concerning any contract of sale of a commodity for future delivery, or any activity subject to Commission regulation under section 4c or 19 of this Act or concerning a security, (ii) arises out of the conduct of the business of a futures commission merchant, introducing broker, floor broker, *floor trader,* commodity trading advisor, commodity pool operator, associated person of any registrant under this Act securities dealer, municipal securities broker, municipal securities dealer, transfer agent, clearing agency, securities information processor, investment adviser, investment company, or an affiliated peson or employee of any of the foregoing, (iii) involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, foregery, counterfeiting, false pretense, bribery, or gambling, or (iv) involves the violation of section 152, *1001,* 1341, 1342, [or] 1343, *1503, 1623, 1961, 1962, 1963, or 2314* 1503, 1623, 1961, 1962, 1963, or 2314, or chapter 25, 47, 95, or 96 of title 18, United States Code, *or section 7201 or 7206 of the Internal Revenue Code of 1986;*

(E) if such person, within ten years preceding the filing of the application or at any time thereafter, has been found [by any court of competent jurisdiction,] *in a proceeding brought* by the Commission or any Federal or State agency or other government body, or by agreement of settlement to which the Commission or any Federal or State agency or other governmental body is a party, (i) to have violated any provision of this Act, the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Securities Investors Protection Act of 1970, the Foreign Corrupt Practices Act

of 1977, *chapter 96 of title 18 of the United States Code*, or any similar statute of a State or foreign jurisdiction, or any rule, regulation, or order under any such statutes, or the rules of the Municipal Securities Rulemaking Board where such violation involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling, or (ii) to have willfully aided, abetted, counseled, commanded, induced or procured such violation by any other person;

(F) if such person is subject to an outstanding order of the Commission denying trading privileges on any contract market to such person, denying, suspending, or revoking such person's membership in any contract market or registered futures association, or barring or suspending such person from being associated with a registrant under this Act or with a member of a contract market or with a member of a registered futures association;

(G) if, as to any of the matters set forth in subparagraph [(A) through (F) of this paragraph,] *this paragraph and paragarph (3)*, such person willfully made any [material] *materially* false or misleading statement or omitted to state any material facat in such person's [application] *application or any update thereto;* or

(H) if refusal, suspension, or revocation of the registration of any principal of such person would be warranted because of a statutory disqualification listed in this paragraph:

Provided, That such person may appeal from a decision to refuse registration, condition registration, suspend, revoke or to place restrictions upon registration made pursuant to the provisions of this paragraph in the manner provided in section 6(b) of this Act; and

Provided, further, That for the purposes of paragraphs (2) and (3) of this section, "principal" shall mean, if the person is a partnership, any general partner or, if the person is a coproration, any officer, director, or beneficial owner of at least 10 per centum of the voting shares of the corporation, and any other person that the Commission by rule, regulation, or order determines has the power, directly or indirectly, through agreement or otherwise, to exercise a controlling influence over the activities of such person which are subject to regulation by the Commission;

(3) to refuse to register or to register conditionally any person, if it is found after opportunity for hearing that—

(A) such person has been found by the Commission or by any court of competent jurisdiction to have violated, or has consented to findings of a violation of, any provision of this Act, or any rule, regulation, or order thereunder (other than a violation set forth in paragraph (2) of this section), or to have willfully aided, abetted, counseled commanded, induced, or procured the violation by any other person of any such provision;

(B) such person has been found by any court of competent jurisdiction or by any Federal or State agency or other governmental body, or by agreement of settlement to which any Federal or State agency or other governmental body is a party, (i) to have violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Securities Investors Protection Act of 1970, the Foreign Corrupt Practices Act of 1977, or any similar statute of a State or foreign jurisdiction, or any rule, regulation, or order under any such statutes, or the rules of the Municipal Securities Rulemaking Board or (ii) to have willfully aided, abetted, counseled, commanded, induced, or procured such violation by any other person;

(C) such person failed reasonably to supervise another person, who is subject to such person's supervision, with a view to preventing violations of this Act, or of any of the statutes set forth in subparagraph (B) of this paragraph, or of any of the rules, regulation, or orders thereunder, and the person subject to supervision committed such a violation: *Provided*, That no person shall be deemed to have failed reasonably to supervise another person, within the meaning of this subparagraph if (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person and (ii) such person has reasonably discharged the duties and obligations incumbent upon that person, as supervisor, by reason of such procedures and system, without reasonable cause to believe that such procedures and system were not being complied with;

(D) such person *pleaded guilty to or* was convicted of a felony other than a felony of the type specified in paragraph (2)(D) of this section, [within ten years preceding the filing of the application or at any time thereafter,] or was convicted of a felony, [including a felony] of the type specified in paragraph (2)(D) of this section[,] more than ten years preceding the filing of the application;

(E) such person *pleaded guilty to or* was convicted [within ten years preceding the filing of the application for registration or at any time thereafter] of any misdemeanor which (i) involves any transaction or advice concerning any contract of sale of a commodity for future delivery or any activity subject to Commission regulation under section 4c or 19 of this Act or concerning a security, (ii) arises out of the conduct of the business of a futures commission merchant, introducing broker, floor broker, *floor trader*, commodity trading advisor, commodity pool operator, associated person of any registrant under this Act, securities broker, securities dealer, municipal securities broker, municipal securities dealer, transfer agent, clearing agency, securities information processor, invest-

ment adviser, investment company, or an affiliated person or employee of any of the foregoing, (iii) involves embezzlement, theft, extortion, fraud, fradulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling, (iv) involves the violation of section 152, 1341, 1342, or 1343 or chapter 25, 47, 95, or 96 of title 18, United States Code, *or section 7203, 7204, 7205, or 7207 of the Internal Revenue Code of 1986.*

(F) such person was debarred by any agency of the United States from contracting with the United States;

(G) such person willfully made any [material] *materially* false or misleading statement or willfully omitted to state any material fact in such person's application[,] *or any update thereto,* in any report required to be filed with the Commission by this Act or the regulations [thereunder, or] thereunder, in any proceeding before the Commission, *or in any registration disqualification proceeding;*

(H) such person has pleaded nolo contendere to criminal charges of felonious conduct, or has been convicted in a State court, *in a United States military court,* or in a foreign court of conduct which would constitute a felony under Federal law if the offense has been committed under Federal jurisdiction;

(I) in the case of an applicant for registration in any capacity for which there are minimum financial requirements prescribed under this Act or under the rules or regulations of the Commission, such person has not established that such person meets such minimum financial requirements;

(J) such person is subject to an outstanding order denying, suspending, or expelling such person from membership in a contract market, a registered futures association, [or] any other self-regulatory organization, *or any foreign regulatory body that the Commission recognizes as having a comparable regulatory program,* or barring or suspending such person from being associated with any member or members of such contract market, association, [or] self-regulatory [organization;] *organization, or foreign regulatory body;*

(K) such person has been found by any court of competent jurisdiction or by any Federal or State agency or other governmental body, or by agreement of settlement to which any Federal or State agency or other governmental body is a party, (i) to have violated any statute or any rule, regulation, or order thereunder which involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling or (ii) to have willfully aided, abetted, counseled, commanded, induced or procured such violation by any other person;

(L) such person has associated with such person any other person and knows, or in the exercise of reasonable care should know, of facts regarding such other person

that are set forth as statutory disqualifications in paragraph (2) of this section, unless such person has notified the Commission of such facts and the Commission has determined that such other person should be registered or temporarily licensed;

(M) there is other good cause; or

(N) any principal, as defined in paragraph (2) of this section, of such person has been or could be refused registration:

Provided, That pending final determination under this paragraph, registration shall not be granted: *Provided further*, That such person may appeal from a decision to refuse registration or to condition registration made pursuant to this paragraph in the manner provided in section 6(b) of this Act;

(4) in accordance with the procedure provided for in section 6(b) of this Act, to suspend, revoke, or place restrictions upon the registration of any person registered under this Act if cause exists under paragraph (3) of this section which would warrant a refusal of registration of such person, and to suspend or revoke the registration of any futures commission merchant or introducing broker who shall knowingly accept any order for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market from any person if such person has been denied trading privileges on any contract market by order of the Commission under section 6(b) of this Act and the period of denial specified in such order shall not have expired: *Provided,* That such person may appeal from a decision to suspend, revoke, or place restrictions upon registration made pursuant to this paragraph in the manner provided in section 6(b) of this Act;

(5) to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this Act[; and]

(6) to communicate to the proper committee or officer of any contract market, registered futures association, or self-regulatory organizations as defined in section 3(a)(26) of the Securities Exchange Act of 1934, notwithstanding the provisions of section 8 of this Act, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Commission disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers, consumers, or investors, or which is necessary or appropriate to effectuate the purposes of this Act: *Provided,* That any information furnished by the Commission under this paragraph shall not be disclosed by such contract market, registered futures association, or self-regulatory organization except in any self-regulatory action or proceeding;

(7) to alter or supplement the rules of a contract market insofar as necessary or appropriate by rule or regulation or by order, if after making the appropriate request in writing to a contract market that such contract market effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commis-

sion determines that such contract market has not made the changes so required, and that such changes are necessary or appropriate for the protection or persons producing, handling, processing, or consuming any commodity traded for future delivery on such contract market, or the product or byproduct thereof, or for the protection of traders or to insure fair dealing in commodities traded for future delivery on such contract market. Such rules, regulations, or orders may specific changes with respect to such matters as:

(A) terms or conditions in contracts of sale to be executed on or subject to the rules of such contract market;

(B) the form or manner of execution of purchases and sale for future delivery;

(C) other trading requirements, excepting the setting of levels of margin;

(D) safeguards with respect to the financial responsibility of members;

(E) the manner, method, and place of soliciting business, including the content of such solicitations; and

(F) the form and manner of handling, recording, and accounting for customers' orders, transactions, and accounts;

(8) to make and promulgate such rules and regulations with respect to those persons registered under this Act, who are not members of a contract market, as in the judgment of the Commission are reasonably necessary to protect the public interest and promote just and equitale principles of trade, including but not limited to the manner, method, and place of soliciting business, including the content of such solicitation;

(9) to direct the contract market, whenever it has reason to believe that an emergency exists, to take such action as in the Commission's judgment is necessary to maintain or restore orderly trading in or liquidation of any futures contract, including, but not limited to, the setting of temporary emergency margin levels on any futures contract, and the fixing of limits that may apply to a market position acquired in good faith prior to the effective date of the Commission's action. The term "emergency" as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity. Any action taken by the Commission under this paragraph shall be subject to review only in the United States Court of Appeals for the circuit in which the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit. Such review shall be based upon an examination of all the information before the Commission at the time the determination was made. The court reviewing the Commission's action shall not enter a stay or order of mandamus unless it has determined, after notice and hearing before a panel of the court, that the agency action complained of was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Nothing herein shall be deemed to

limit the meaning or interpretation given by a contract market to the terms "market emergency", "emergency", or equivalent language in its own bylaws, rules, regulations, or resolutions; [and]

(10) to authorize any person to perform any portion of the registration functions under this Act, in accordance with rules, notwithstanding any other provision of law, adopted by such person and submitted to the Commission for approval or, if applicable, for review pursuant to section 17(j) of this act, and subject to the provisions of this Act applicable to registrations granted by the Commission[.]; *and*

(11)(A) by written notice served on the person and pursuant to such rules, regulations, and orders as the Commission may adopt, to suspend or modify the registration of any person registered under this Act who is charged (in any information, indictment, or complaint authorized by a United States attorney or an appropriate official of any State) with the commission of or participation in a crime involving a violation of this Act, or a violation of any other provision of Federal or State law that would reflect on the honesty or the fitness of the person to act as a fiduciary (including an offense specified in subparagraph (D) or (E) of paragraph (2)) that is punishable by imprisonment for a term exceeding 1 year, if the Commission determines that continued registration of the person may pose a threat to the public interest or may threaten to impair public confidence in any market regulated by the Commission.

(B) Prior to the suspension or modification of the registration of a person under this paragraph, the person shall be afforded an opportunity for a hearing at which the Commission shall have the burden of showing that the continued registration of the person does, or is likely to, pose a threat to the public interest or threaten to impair public confidence in any market regulated by the Commission.

(C) Any notice of suspension or modification issued under this paragraph shall remain in effect until such information, indictment, or complaint is disposed of or until terminated by the Commission.

(D) On disposition of such information, indictment, or complaint, the Commission may issue and serve on such person an order pursuant to paragraph (2) or (4) to suspend, restrict, or revoke the registration of such person.

(E) A finding of not guilty or other disposition of the charge shall not preclude the Commission from thereafter instituting any other proceedings under this Act.

(F) A person aggrieved by an order issued under this paragraph may obtain review of such order in the same manner and on the same terms and conditions as are provided in section 6(b).

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[COMMISSION ACTION FOR NON-COMPLIANCE WITH EXPORT SALES REPORTING REQUIREMENTS]

SEC. 8d. The Commission may, in accordance with the procedures provided for in this Act, refuse to register, register conditionally, or suspend, place restrictions upon, or revoke the registration of, any person, and may bar for any period as it deems appropriate any person from using or participating in any manner in any market regulated by the Commission, if such person is subject to a final decision or order of any court of competent jurisdiction or agency of the United States finding such person to have knowingly violated any provision of the export sales reporting requirements of section 812 of the Agricultural Act of 1970 (7 U.S.C. section 612c–3), or of any regulation issued thereunder.

SEC. 8e. COMMISSION OVERSIGHT; DEFICIENCY ORDERS.

(a) ASSESSMENTS.—Not later than 18 months after the date of enactment of this section, and at least once every 2 years thereafter, the Commission shall assess whether the trade monitoring system of each contract market satisfies section 5a(b).

(b) ORDERS.—

(1) CAUSES.—The Commission shall issue a proposed deficiency order in accordance with paragraph (2) if, based on its assessment or on other information, the Commission at any time has reason to believe that a contract market's trade monitoring system implemented pursuant to section 5a(b) does not satisfy one or more of the requirements of such section.

(2) CONTENTS.—A proposed order issued under this subsection shall specify—

(A) the deficiencies the Commission has reason to believe exist in the trade monitoring system of the contract market and a statement of reasons supporting the Commission's belief that those deficiencies exist;

(B) the corrective action that the Commission believes that the contract market must take and an acceptable timetable for such corrective action; and

(C) a date, not less than 20 days from the date of issuance of the proposed order, when such order will become final, subject to subsection (d).

(3) REMEDIES.—On becoming final, the Commission order may require the contract market to—

(A) institute appropriate improvements in its trade monitoring system necessary to correct the deficiencies noted therein;

(B) satisfy stated objective performance criteria to correct such deficiencies;

(C) upgrade or reconfigure existing systems for collecting or processing relevant data on trading and trader or broker activity, including, where appropriate, the commitment of additional resources;

(D) suspend the privilege of dual trading in such contract market, if the deficiency noted in such order relates to the prevention, detection, or disciplining of violations attributable to such trading at such contract market, subject to the

standards, exceptions, and duration provisions of subsection (c); or

(E) take any combination of the actions described in subparagraphs (A) through (D).

(4) REMOVAL.—If the Commission finds, after notice and opportunity for a hearing on the record prior to such order becoming final, that a named officer, director, committee member, or employee of such market has willfully—

(A) violated this Act, the rules or regulations of the Commission thereunder, or the rules of such contract market;

(B) abused the authority of such person; or

(C) without reasonable justification or excuse has failed to enforce compliance with any provision of the rules of such contract market by any member or person associated with a member thereof;

the Commission may issue an order under this section to remove such officer, director, committee member, or employee.

(5) DESIGNATION AS CONTRACT MARKET.—Notwithstanding section 6, during the period that a proposed or final order under this section is in effect, the Commission may refrain from approving any application for designation as a contract market made by the exchange whose contract market is the subject of such order.

(6) DELEGATION.—The Commission shall not delegate the authority to issue orders under this subsection.

(c) DUAL TRADING.—

(1) IN GENERAL.—Within 18 months after the date of enactment of this section, the Commission shall initate proceedings to suspend the privilege of dual trading one each contract market, pursuant to an order issued under subsection (b) that becomes final under subsection (d), unless the Commission determines, as part of the first assessment made of such contract market under subsection (a), that—

(A) the trade monitoring system in place at the contract market satifies the requirements of section 5a(b), such that such system is capable of and is being used to detect and bring appropriate disciplinary actions with regard to violations attributable to dual trading at such contract market; or

(B)(i) there is a substantial likelihood that a dual trading suspension would harm the public interest in hedging and price basing at such contract market; and

(ii) other remedies under subsection (b) are more appropriate.

(2) EXCEPTIONS.—A Commission order suspending dual trading may provide for exceptions to ensure fairness and orderly trading in such contract market (including, where appropriate, a reasonable phase-in period, a limitation of the suspension to specified contracts, exceptions for certain spread transactions, corrections of trading errors, or allowing a customer to designate in writing not less than once annually a named floor broker to execute orders for such customer).

(3) DURATION.—Such suspension shall remain in effect until the Commission makes the finding required under paragraph

(1). The Commission shall act expeditiously to consider making such finding upon any demonstration by the contract market under paragraph (1).

(d) RESCISSION, MODIFICATION, OR DELAY OF ORDERS.—Before any proposed deficiency order issued by the Commission under subsection (b) may become final, the Commission shall—

(1) provide the affected contract market with an opportunity for a hearing through submission of written data, views, or arguments and, under terms set by the Commission at the request of the contract market, through an oral presentation of views and comments to the Commission in order to petition the Commission to rescind, modify, or delay such order; and

(2) rule on such petition, not less than 20 days before the order takes effect, making findings, as appropriate, as to whether—

(A) the deficiencies cited by the Commission have been corrected or are being corrected under an expeditious timetable acceptable to the Commission;

(B) the trade monitoring system of the contract market is deficient as noted in the deficiency order; or

(C) the timetable proposed by the Commission in its proposed order for corrective action by the contract market, and the particular corrective action proposed, is appropriate in light of the deficiencies noted and the purposes of this Act.

(e) PENALTIES.—Violation of a final deficiency order issued under subsection (d) shall be considered a violation of an order of the Commission for purposes of—

(1) establishing liability and assess penalties against a contract market or any director, officer, agent, or employee thereof under section 6(b); or

(2) initiating proceedings under section 5(b) or 6(a).

(f) JUDICIAL REVIEW.—

(1) PERSONS.—Any person, other than a contract market, aggrieved by an order issued under subsection (b)(4), may obtain review of such order when issued by the Commission under the terms and conditions in section 6(b).

(2) CONTRACT MARKETS.—Any contract market that has petitioned the Commission to rescind, modify, or delay any proposed order issued under subsection (b) may obtain judicial review of any final such order only in the United States Court of Appeals for the circuit in which the party seeking review resides or has its principal place of business, or in the United States Court of Appeals for the District of Columbia Circuit, under the standards applicable to rulemaking proceedings under section 553 of title 5, United States Code.

(g) REPORTS.—

(1) REPORTS ON ORDERS.—Within 3 days of the issuance of any proposed or final order under this section or a finding under subsection (c)(1) with respect to dual trading, the Commission shall report to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate on such order or finding, including a description of—

(A) the contract market involved;

(B) the deficiencies alleged in the trade monitoring system at such contract market; and

(C) the remedies sought by such order.

(2) ANNUAL REPORTS.—The Commission shall report annually to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate on actions taken to carry out this section, including a description of—

(A) the findings of the Commission with respect to each trade monitoring system at a contract market examined by the Commission during such period; and

(B) any proposed or final order issued by the Commission under this section based on deficiencies the Commission has uncovered in such systems, including an analysis of the remedies imposed against, and the corrective action taken by, the contract market pursuant to such order.

(h) DEFINITION OF DUAL TRADING.—As used in this section, the term "dual trading" means the execution of customer orders by a floor broker on any trading day during which the floor broker has executed any trade in the same contract market for—

(1) the account of the floor broker;

(2) an account for which the broker has trading discretion; or

(3) an account controlled by a person with whom such broker is subject to trading restrictions under section 4j(3).

[VIOLATIONS GENERALLY]

SEC. 9. (a) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person registered or required to be registered under this Act, or any employee or agent thereof, to embezzle, steal, purloin, or with criminal intent convert to his own use or the use of another, any money, securities, or property having a value in excess of $100, which was received by such person or any employee or agent thereof to margin, guarantee, or secure the trades or contracts of any customer or accruing to such customer as a result of such trades or contracts or which otherwise was received from any customer, client, or pool participant in connection with the business of such person. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than [$100,000] *the higher of $100,000 or triple the monetary gain to such person,* together with the costs of prosecution. The word "value" as used in this subsection means face, par, or market value, or cost price, either wholesale or retail, whichever is greater. A person convicted of a felony under this subsection shall be suspended from registration under this Act and shall be denied registration or reregistration for five years or such longer period as the Commission shall determine, unless the Commission determines that the imposition of such suspension or denial of registration or reregistration is not required to protect the public interest. The Commission may upon petition later review such disqualification and for good cause shown reduce the period thereof.

(b) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce, or knowingly to violate the provisions of section 4, section 4b, section 4c(b) through section 4c(e), section 4h, section 4o(1), or section 19 of this Act, or knowingly to make any false or misleading statement of a material fact in any registration application or report filed with the Commission, or knowingly to omit in any application or report any material fact that is required to be stated therein. Notwithstanding the foregoing, in the case of any violation described in the foregoing sentence by a person who is an individual, the fine shall not be more than [$100,000] *the higher of $100,000 or triple the monetary gain to such person*, together with the costs of prosecution. A person convicted of a felony under this subsection shall be suspended from any registration under this Act, denied registration or reregistration for five years or such longer period as the Commission shall determine, and barred from using or participating in any manner in any market regulated by the Commission for five years or such longer period as the Commission shall determine on such terms and conditions as the Commission may prescribe, unless the Commission determines that the imposition of such suspension, denial of registration or reregistration, or market bar is not required to protect the public interest. The Commission may upon petition later review such disqualification and market bar and for good cause shown reduce the period thereof.

(c) Except as provided in subsections (a), (b), (d), and (e) of this section, it shall be a misdemeanor punishable by a fine of not more than [$100,000] *the higher of $100,000 or triple the monetary gain to such person* or imprisonment for not more than one year, or both, together with the costs of prosecution, for any person to violate any provisions of section 4a, section 4c(a), section 4d, section 4e, section 4i, section 4k, section 4m, section 4o(2), or section 8b, or to fail to evidence any contract mentioned in section 4 of this Act by a record in writing as therein required. A person convicted under this subsection of knowingly violating the provisions of section 4a shall be suspended from any registration under this Act, denied registration or reregistration for a period of two years or such longer period as the Commission shall determine, and barred from using or participating in any manner in any market regulated by the Commission for two years or such longer period as the Commission shall determine on such terms and conditions as the Commission may prescribe, unless the Commission determines that the imposition of such suspension, denial of registration or reregistration, or market bar is not required to protect the public interest. The Commission may upon petition later review such disqualifica-

tion and market bar and for good cause shown reduce the period thereof.

(d) It shall be a felony punishable by a fine of not more than [$100,000] *the higher of $100,000 or triple the monetary gain to such person* or imprisonment for not more than five years, or both, together with the costs of prosecution, for any Commissioner of the Commission or any employee or agent thereof, to participate, directly or indirectly, in any transaction in commodity futures or any transaction of the character of or which is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such a standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract, or for any such person to participate, directly or indirectly, in any investment transaction in an actual commodity if nonpublic information is used in the investment transaction, if the investment transaction is prohibited by rule or regulation of the Commission, or if the investment transaction is effected by means of any instrument regulated by the Commission.

The foregoing prohibitions shall not apply to any transaction or class of transactions that the Commission, by rule or regulation, has determined would not be contrary to the public interest or otherwise inconsistent with the purposes of this subsection.

(e) It shall be a felony punishable by a fine of not more than [$100,000] *the higher of $100,000 or triple the monetary gain to such person* or imprisonment for not more than five years, or both, together with the costs of prosecution—(1) for any Commissioner of the Commission or any employee or agent thereof who, by virtue of his employment or position, acquires information which may affect or tend to affect the price of any commodity futures or commodity and which information has not been made public to impart such information with intent to assist another person, directly or indirectly, to participate in any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known to the trade as an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or in any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such as standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract; and (2) for any person to acquire such information from any Commissioner of the Commission or any employee or agent thereof and to use such information in any transaction in commodity futures, any transaction in actual commodity, or in any transaction of the character of or which is commonly known to the trade as "option", "privilege",

"indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or in any transaction for the delivery of any commodity under a standardized contract commonly known to the trade as a margin account, margin contract, leverage account, or leverage contract, or under any contract, account, arrangement, scheme, or device that the Commission determines serves the same function or functions as such as standardized contract, or is marketed or managed in substantially the same manner as such a standardized contract.

(g) It shall be a felony punishable by a fine of not more than $100,000 or imprisonment for not more than 5 years, or both, together with the costs of prosecution, for any person knowingly and willfully to falsify, conceal, or cover up by any trick, scheme, or artifice a material fact, make any false, fictitious, or fraudulent statements or representations, or make or use any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry to a contract market, board of trade, or futures association designated or registered under this Act acting in futherance of its official duties under this Act.

(h) Any person who knowingly and willfully violates any provision of this Act, or any rule or regulation thereunder the violation of which is made unalwful or the observance of which is required under the terms of this Act, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this Act or any rule or regulation thereunder or any undertaking contained in a registration statement required under this Act, or by any contract market or registered futures association in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall on conviction be fined not more than $500,000, or imprisoned not more than 5 years, or both, except that no person shall be found to have acted knowingly for purposes of this section if the person proves that the person had no knowledge of such requirement under this Act or rule or regulation.

(i) It shall be a felony for any person who is an employee, member of the governing board, or member of any committee of a board of trade, contract market, or registered futures association, in violation of a regulation issued by the Commission, willfully and knowingly to trade for such person's own account in contracts for future delivery or options thereon on the basis of, or to disclose for any purpose inconsistent with the performance of such person's official duties as an employee or member, any material nonpublic information obtained through special access related to the performance of such duties. Such felony shall be punishable by a fine of not more than $500,000, plus the amount of any profits realized from such trading or disclosure made in violation of this subsection, or imprisonment for not more than 5 years, or both, together with the costs of prosecution.

* * * * * * *

[COMMISSION OPERATIONS]

SEC. 12. (a) The Commission may cooperate with any Department or agency of the Government, any State, territory, district, or possession, or department, agency, or political subdivision thereof, *any foreign futures authority, any department or agency of a foreign government or political subdivision thereof,* or any person.

(b)*(1)* The Commission shall have the authority to employ such investigators, special experts, Administrative Law Judges, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

(2) The Commission may employ experts and consultants in accordance with section 3109 of title 5 of the United States Code, and compensate such persons at rates not in excess of the maximum daily rate prescribed for GS–18 under section 5332 of title 5 of the United States Code.

(3) The Commission shall also have authority to make and enter into contracts with respect to all matters which in the judgment of the Commission are necessary and appropriate to effectuate the purposes and provisions of this Act, including, but not limited to, the rental of necessary space at the seat of Government and elsewhere.

(4)(A) The Commission shall fix the compensation and number of, and appoint and direct, employees of the Commission. Rates of basic pay for employees of the Commission may be set and adjusted by the Commission without regard to the provisions of chapter 51, subchapters III and VIII of chapter 53, and chapter 54 of title 5, United States Code.

(B) The Commission may provide additional compensation and benefits to employees of the Commission if the same type of compensation or benefits are then being provided by any Federal bank regulatory agency or, if not then being provided, could be provided by such an agency under applicable provisions of law, rule, or regulation. In setting and adjusting the total amount of compensation and benefits for employees of the Commission, the Commission shall seek to maintain comparability with the Federal bank regulatory agencies. For the purpose of this paragraph, the term "Federal bank regulatory agency" means the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration Board.

(c) All of the expenses of the Commissioners, including all necessary expenses for transportation incurred by them while on official business of the Commission, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Commission.

[(d) There are authorized to be appropriated to carry out this Act such sums as may be necessary for each of the fiscal years during the period beginning October 1, 1986, and ending September 30, 1989.**]**

(d) There are authorized to be appropriated to carry out this Act $48,300,000 for fiscal year 1992, $56,100,000 for fiscal year 1993,

$61,900,000 for fiscal year 1994, $68,200,000 for fiscal year 1995, and $71,900,000 for fiscal year 1996.

(e) Nothing in this Act shall supersede or preempt—

(1) criminal prosecution under any Federal criminal statute;

(2) the application of any Federal or State statute, including any rule or regulation thereunder, to any transaction in or involving any commodity, product, right, service, or interest (A) that is not conducted on or subject to the rules of a contract market, or (B) (except as otherwise specified by the Commission by rule or regulation) that is not conducted on or subject to the rules of any board of trade, exchange, or market located outside the United States, its territories or possessions, or (C) that is not subject to regulation by the Commission under section 4c or 19 of this Act; or

(3) the application of any Federal or State statute, including any rule or regulation thereunder, to any person required to be registered or designated under this Act who shall fail or refuse to obtain such registration or designation.

The Commission may refer any transaction or matter subject to such other Federal or State statutes to any department or agency administering such statutes for such investigation, action, or proceedings as that department or agency shall deem appropriate.

(f)(1) Notwithstanding any other provision of law, the Commission shall promulgate, after notice and opportunity for hearing, a schedule of appropriate fees to be assessed against persons benefiting from services rendered and activities and functions performed by the Commission in conjunction with its administration and enforcement of this Act.

(2) Except as provided in paragraph (3), such fees shall reflect the cost to the Commission of—

(A) monitoring trading on the floors of designated contract markets to prevent and deter violations of this Act;

(B) supervising contract markets, futures associations, leverage transaction merchants, and other registrants to ensure compliance with self-regulatory standards established under this Act;

(C) analyzing and designating new futures, option, or leverage contracts; and

(D) such other services, activities, and functions as the Commission finds appropriate for such fees.

(3) The total amount of fees assessed under this subsection shall not exceed $3,900,000 during fiscal year 1992, $7,800,000 during fiscal year 1993, $13,800,000 during fiscal year 1994, $20,800,000 during fiscal year 1995, and $21,700,000 during fiscal year 1996.

(4) In promulgating a schedule of appropriate fees under this subsection to be assessed against persons benefiting from services rendered or activities performed by the Commission, the Commission may consider phasing in any new or increased fees. In making such determination, the Commission shall consider (A) the immediate impact on the Federal budget of increasing the size and scope of the Commission, and (B) the burden of other reasonable costs being borne by such persons for purposes of such persons coming into compliance with the standards of section 5a(b).

(g)(1) On request from a foreign futures authority, the Commission may, in its discretion, provide assistance in accordance with this section if the requesting authority states that the requesting authority is conducting an investigation that it considers necessary to determine whether any person has violated, is violating, or is about to violate any law, rule, or regulation relating to a futures or options matter that the requesting authority administers or enforces.

(2) The Commission may conduct such investigation as the Commission considers necessary to collect information and evidence pertinent to the request for assistance.

(3) Such assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of a law of the United States.

(4) In deciding whether to provide assistance under this subsection, the Commission shall consider whether—

(A) the requesting authority has agreed to provide reciprocal assistance to the Commission in futures and options matters; and

(B) compliance with the request would prejudice the public interest of the United States.

(h) Notwithstanding any other provision of law, the Commission may accept payment and reimbursement, in cash or in kind, from a foreign futures authority, or made on behalf of such authority, for necessary expenses incurred by the Commission (including its members and employees) in carrying out any investigation conducted pursuant to this section or in providing any other assistance to a foreign futures authority. Any payment or reimbursement accepted under this subsection shall be considered a reimbursement to the appropriated funds of the Commission.

(i) Consistent with its responsibilities under section 18, the Commission is directed to facilitate the development and operation of computerized trading as an adjunct to the open out cry auction system. The Commission is further directed to cooperate with the Office of the United States Trade Representatives, the Treasury Department, the Department of Commerce and the Department of State in order to remove any trade barriers that may be imposed by a foreign nation on the international use of electronic trading systems.

(j) In discharging the duties and functions of the Commission under this Act, the Commission shall take into consideration, and endeavor to serve, the interests of producers of agricultural commodities, consistent with the responsibility of the Commission to promote the public interests served by, and integrity of, futures and options markets. The Commission shall include in the annual reports of the Commission to Congress information describing specific actions taken by the Commission to discharge the responsibilities of the Commission under the preceding sentence.

* * * * * * *

[COMPLAINTS AGAINST REGISTERED PERSONS]

SEC. 14. (a)(1) Any person complaining of any violation of any provision of this Act, or any rule, regulation, or order issued pursuant to this Act, by any person who is registered under this Act

may, at any time within two years after the cause of action accrues, apply to the Commission for an order [awarding actual damages proximately caused by such violation] *awarding—*

(A) actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so; and

(B) in the case of any action arising from a willful and intentional violation in the execution of an order on the floor of a contract market, punitive or exemplary damages equal to no more than two times the amount of such actual damages. If an award of punitive or exemplary damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation.

(2)(A) An action may be brought under this subsection by any one or more persons described in this subsection for and in behalf of such person or persons and other persons similarly situated, if the Commission permits such actions pursuant to a final rule issued by the Commission.

(B) Not later than 270 days after the date of enactment of this paragraph, the Commission shall propose and publish for public comment such rules are necessary to carry out subparagraph (A). In developing such rules, the Commission shall consider the potential impact of such actions on resources available to the reparations system established under this Act and the relative merits of bringing such actions in Federal court.

* * * * * * *

[REGISTERED FUTURES ASSOCIATIONS]

SEC. 17. (a) Any association of persons may by registered with the Commission as a registered futures association pursuant to subsection (b) of this section, under the terms and conditions hereinafter provided in this section, by filing with the Commission for review and approval a registration statement in such form as the Commission may prescribe, setting forth the information, and accompanied by the documents, below specified:

(1) Data as to its organization, membership, and rules of procedure, and such other information as the Commission may by rules and regulations require as necessary or appropriate in the public interest; and

(2) Copies of its constitution, chapter, or articles of incorporation or association, with all amendments thereto, and of its bylaws, and

of any rules or instruments corresponding to the foregoing, whatever the name, hereinafter in this section collectively referred to as the "rules of the association".

(b) An applicant association shall not be registered as a futures association unless the Commission finds, under standards established by the Commission, that—

(1) * * *

(2) * * *

* * * * * * *

(10) the rules of the association provide a fair, equitable, and expeditious procedure through arbitration or otherwise for the settlement of customers' claims and grievances against any member or employee thereof: *Provided,* That [(i)] *(A)* the use of such procedure by a customer shall be [voluntary and (ii)] *voluntary, (13)* the term "customer" as used in this paragraph shall not include another member of the association, *and (C) in the case of a claim arising from a violation in the execution of an order on the floor of a contract market, such procedure shall provide, to the extent appropriate—*

(i) for payment for actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so; and

(ii) where the violations is willful and intentional, for payment to the customer of punitive or exemplary damages, in addition to losses proximately caused by the violation, in an amount equal to no more than two times the amount of such losses. If punitive or exemplary damages are awarded against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of such order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy the award of punitive or exemplary damages if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation.

(11) such association provides for meaningful representation on the governing board of such association of a diversity of membership interests and provides that no less than 20 percent of the members of such board be comprised of qualified nonmembers of or persons who are not regulated by such association.

(12)(A) such association provides on all major disciplinary committees for a diversity of membership sufficient to ensure fairness and to prevent special treatment or preference for any

person in the conduct of disciplinary proceedings and the assessment of penalties.

(13) A major disciplinary committee hearing a disciplinary matter such include—

(i) qualified persons representing segments of the association membership other than that of the subject of the proceeding; and

(ii) where appropriate to carry out the purposes of this paragraph, qualified persons who are not members of the association.

* * * * * * *

(i)(1) In a proceeding to review a final disciplinary action taken by a registered futures association against a member thereof or a person associated with a member, after appropriate notice and opportunity for a hearing (which hearing may consist solely of consideration of the record before the association and opportunity of the presentation of supporting reasons to affirm, modify, or set aside the sanction imposed by the association)—

(A) if the Commission finds that—

(i) the member or person associated with a member has engaged in the acts or practices, or has omitted the acts, that the association has found the member or person to have engaged in or omitted;

(ii) the acts or practices, or omissions to act, are in violation of the rules of the association specified in the determination of the association; and

(iii) such rules are, and were applied in a manner, consistent with the purposes of this Act,

the Commission, by order, shall so declare and, as appropriate, affirm the sanction imposed by the association, modify the sanction in accordance with paragraph (2), or remand the case to the association for future proceedings; or

(B) if the Commission does not make any such finding, the Commission, by order, shall set aside the sanction imposed by the association and, if appropriate, remand the case to the association for further proceedings.

(2) If, after a proceeding under paragraph (1), the Commission finds that any penalty imposed on a member or person associated with a member is excessive or oppressive, having due regard for the public interest, the Commission, by order, shall cancel, reduce, or require the remission of the penalty.

(3) In a proceeding to review the denial of membership in a registered futures association or the barring of any person from being associated with a member, after appropriate notice and opportunity for a hearing (which hearing may consist solely of consideration of the record before the association and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the action of the association)—

(A) if the Commission finds that—

(i) the specific grounds on which the denial or bar is based exist in fact;

(ii) the denial or bar is accordance with the rules of the association; and

(iii) such rules are, and were applied in a manner, consistent with the purposes of this Act,

the Commission by order, shall do declare and, as appropriate, affirm or modify the action of the association, or remand the case to the association for further proceedings; or

(B) if the Commission does not make any such finding, the Commission, by order, shall set aside the action of the association and require the association to admit the applicant to membership or permit the person to be associated with a member, or, as appropriate, remand the case to the association for further proceedings.

(4) Any person [(other than a registered futures association)] aggrieved by a final order of the Commission entered under this subsection may file a petition for review with a United States court of appeals in the same manner as provided in section 6(b).

* * * * * * *

(p) Notwithstanding any other provision of this section, each futures association registered under this section on the date of enactment of the Futures Trading Act of 1982, shall adopt and submit for Commission approval not later than ninety days after such date of enactment, and each futures association that applies for registration after such date adopt and include with its application for registration, rules of the association that require the association to—

(1) establish training standards and proficiency testing for persons involved in the solicitation of transactions subject to the provisions of this Act, supervisors of such persons, and all persons for which it has registration responsibilities, and a program to audit and enforce compliance with such standards;

(2) establish minimum capital, segregation and other financial requirements applicable to its members for which such requirements are imposed by the Commission and implement a program to audit and enforce compliance with such requirements, except that such requirements may not be less stringent than those imposed on such firms by this Act or by Commission regulation; [and]

(3) establish minimum standards governing the sales practices of its members and persons associated therewith for transactions subject to the provisions of this Act[.]*; and*

(4) establish special supervisory guidelines to protect the public interest relating to the solicitation by telephone of new futures or options accounts and make such guidelines applicable to those members determined to require such guidelines in accordance with standards established by the Commission consistent with this Act. Such guidelines may include a requirement that, with respect to a customer with no previous futures or commodity options trading experience, the member may not enter an order for the account of such customer for a period of 3 days following opening of the account and receipt of a signed acknowledgment by the customer of receipt of a risk disclosure statement.

(q) Each futures association registered under this section shall develop a comprehensive program that fully implements the rules approved by the Commission under this section as soon as practica-

ble but not later than September 30, 1985, in the case of any futures association registered on the date of enactment of the Futures Trading Act of 1982, and not later than two and one-half years after the date of registration in the case of any other futures association registered under this section.

* * * * * * *

[PRIVATE RIGHTS OF ACTION]

SEC. 22. (a)(1) Any person (other than a contract market, clearing organization of a contract market, licensed board of trade, or registered futures association) who violates this Act or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this Act shall be liable for actual damages resulting from one or more of the transactions referred to in clauses (A) through (D) of this paragraph and caused by such violation to any other person—

(A) who received trading advice from such person for a fee;

(B) who made through such person any contract of sale of any commodity for future delivery (or option on such contract or any commodity); or who deposited with or paid such person money, securities, or property (or incurred debt in lieu thereof) in connection with any order to make such contract;

(C) who purchased from or sold to such person or placed through such person an order for the purchase or sale of—

(i) an option subject to section 4c of this Act (other than an option purchased or sold on a contract market or other board of trade);

(ii) a contract subject to section 19 of this Act; or

(iii) an interest or participation in a commodity pool; or

(D) who purchased or sold a contract referred to in clause (B) hereof if the violation constitutes a manipulation of the price of any such contract or the price of the commodity underlying such contract.

(2) Except as provided in subsection (b), the rights of action authorized by this subsection and by sections [5a(11)] *sections 5a(a)(11),* 14, and 17b(10) of this Act shall be the exclusive remedies under this Act available to any person who sustains loss as a result of any alleged violation of this Act. Nothing in this subsection shall limit or abridge the rights of the parties to agree in advance of a dispute upon any forum for resolving claims under this section, including arbitration.

(3) In any action arising from a violation in the execution of an order on the floor of a contract market, the person referred to in paragraph (1) shall be liable for—

(A) actual damages proximately caused by such violation. If an award of actual damages is made against a floor broker in connection with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so; and

(B) where the violation is willful and intentional, punitive or exemplary damages equal to no more than two times the amount of such actual damages. If an award of punitive or exemplary damages is made against a floor broker in conneciton with the execution of a customer order, and the futures commission merchant which selected the floor broker for the execution of the customer order is held to be responsible under section 2(a)(1) for the floor broker's violation, such futures commission merchant may be required to satisfy such award if the floor broker fails to do so, except that such requirement shall apply to the futures commission merchant only if it willfully and intentionally selected the floor broker with the intent to assist or facilitate the floor broker's violation.

(b)(1)(A) A contract market or clearing organization of a contract market that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by [section 5a(8) and section 5a(9)] *section 5a(a)(8) and section 5a(a)(9)* of this Act, (B) a licensed board of trade that fails to enforce any bylaw, rule, regulation, or resolution that it is required to enforce by the Commission, or (C) any contract market, clearing organization of a contract market, or licensed board of trade that in enforcing any such bylaw, rule, regulation, or resolution violates this Act or any Commission rule, regulation, or order, shall be liable for actual damages sustained by a person who engaged in any transaction on or subject to the rules of such contract market or licensed board of trade to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaws, rules, regulations, or resolutions.

(2) A registered futures association that fails to enforce any bylaw or rule that is required under section 17 of this Act or in enforcing any such bylaw or rule violates this Act or any Commission rule, regulation, or order shall be liable for actual damages sustained by a person that engaged in any transaction specified in subsection (a) of this section to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce or enforcement of such bylaw or rule.

(3) Any individual who, in the capacity as an officer, director, governor, committee member, or employee of a contract market, clearing organization, licensed board of trade, or a registered futures association willfully aids, abets, counsels, induces, or procures any failure by any such entity to enforce (or any violation of the Act in enforcing) any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, shall be liable for actual damages sustained by a person who engaged in any transaction specified in subsection (a) of this section on, or subject to the rules, of, such contract market, licensed board of trade or, in the case of an officer, director, governor, committee member, or employee of a registered futures association, any transaction specified in subsection (a) of this section, in either case to the extent of such person's actual losses that resulted from such transaction and were caused by such failure or violation.

(4) A person seeking to enforce liability under this section must establish that the contract market, licensed board of trade, clearing organization, registered futures association, officer, director, gover-

nor, committee member, or employee acted in bad faith in failing to take action or in taking such action as was taken, and that such failure or action caused the loss.

(5) The rights of action authorized by this subsection shall be the exclusive remedy under this Act available to any person who sustains a loss as a result of (A) the alleged failure by a contract market, licensed board of trade, clearing organization, or registered futures association or by any officer, director, governor, committee member, or employee to enforce any bylaw, rule, regulation, or resolution referred to in paragraph (1) or (2) of this subsection, or (B) the taking of action in enforcing any bylaw, rule, regulation, or resolution referred to in this subsection that is alleged to have violated this Act, or any Commission rule, regulation, or order.

(c) The United States district courts shall have exclusive jurisdiction of actions brought under this section. Any such action must be brought within two years after the date the cause of action accrued. *Any action brought under subsection (a) may be brought in any district in which the defendant is found or is an inhabitant or transacts business, or in the district in which any act or transaction constituting the violation occurred. Process in such action may be served in any district of which the defendant is an inhabitant or wherever the defendant may be found.*

(d) The provisions of this section shall become effective with respect to causes of action accruing on or after the date of enactment of the Futures Trading Act of 1982: *Provided*, That the enactment of the Futures Trading Act of 1982 shall not affect any right of any parties which may exist with respect to causes of action accruing prior to such date.

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FUTURES TRADING ACT OF 1978

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[SEC. 26. DEVELOPMENT AND IMPLEMENTATION OF PLAN FOR USER FEES: REPORT TO AND APPROVAL BY CONGRESSIONAL COMMITTEES

[Notwithstanding any other provision of law, the Commodity Futures Trading Commission may develop and implement a plan to charge and collect reasonable fees to cover the estimated cost of regulating transactions under the jurisdiction of the Commission. However, prior to implementing such a plan, the Commission shall report its intention to do so to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry. The Commission shall include in its report the feasibility and desirability of collecting such fees. Any plan developed under this section shall not be implemented until approved by the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry. Fees collected under any plan approved under this section shall be deposited in the Treasury of the United States as miscellaneous receipts.]

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